Case No. 82-5519

IN THE

SUPREME COURT OF THE UNITED STATES

FLOYD MORGAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Case No.

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v.

STATE OF FLORIDA,

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QUESTIONS PRESENTED

I.

Whether the procedure of Section 921.141, Florida Statutes is unconstitutional as applied to Morgan in the trial court because the judge and jury were precluded from considering the independent mitigating weight of the evidence which petitioner presented as the basis for a sentence of less than death?

II.

Whether the Florida Supreme Court has applied Florida's death penalty statute to Morgan in an arbitrary and capricious manner by upholding or finding that the murder in this case was especially heinous, atrocious or cruel while rejecting the same finding which used virtually the same language in another case?

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TABLE OF CITATIONS

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed by this petition is reported as Morgan v. State, 415 So.2d 6 (Fla. 1982). It is reproduced in the appendix as item 1 (A-1-7).

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on March 18, 1982 (A-1-7). Petitioner filed a motion for rehearing which was denied on July 9, 1982 (A-8). Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his behalf, and to have the assistance of counsel for his defense.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Section 921.141, Florida Statutes (1978) which is set forth in the appendix as A-9-11.

STATEMENT OF THE CASE AND FACTS*

Following a trial held in Union County, Florida on June 14, 1978, Floyd Morgan was convicted of the murder of Joe Saylor, who was stabbed to death in his cell in Union Correctional Institute at approximately 2:00 a.m. on July 16, 1977. Following the jury's recommendation of death, the trial court sentenced Morgan to death on July 17, 1978. At the time of the murder, Morgan was under a sentence of 30 years imprisonment for second degree murder.

Glynn Griffin, another inmate, testified that at Morgan's request he made a knife for him in the prison shop. At the trial, Griffin identified a knife as the one he made. The knife was admitted into evidence. Griffin testified further that Morgan told him he wanted the knife in order to stab a man who owed him $400 and would not pay.

Dan Helton, one of Morgan's cellmates testified that he, the victim Joe Saylor, and two other prisoners were in their cell in bed and asleep by 12:00 midnight on the night of July 15. Helton testified that he was later awakened by a yell following which a cellmate told him to turn on the light. Then he saw Joe Saylor on the floor covered with blood.

Michael Daley, a prisoner whose cell was nearby, testified that he was sitting at a table in the hall writing

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* The statement of the case and facts is taken from the Supreme Court's opinion in this case. Additions are made for completeness only.

a letter that night after most of the other prisoners had gone to sleep. He heard noises from Morgan's cell. Then, Morgan walked out of the cell, and walked down the hall toward a lavatory. Daley followed him to find out what had happened. In the lavatory, he saw that Morgan's right hand was cut on the palm side across the base of the fingers.

William Williamson, who slept in a nearby cell, was reading at 2:00 a.m., he testified, when he heard noises. He ran out of his room and saw Morgan whose hand was bleeding. Morgan said, "I killed him."

On the morning of the murder, Morgan was interrogated by prison investigators. Inspector Ackett testified that Morgan voluntarily made a statement admitting that he committed the murder. That same day, Morgan was removed from his residence at Union Correctional Institute and taken to the Lake Butler Reception and Medical Center, where he was confined until September 9, 1977. Then he was transferred to Florida State Prison until his arraignment on January 16, 1978. Morgan was indicted on November 28, 1977, and was represented by counsel at his arraignment.

On May 19, 1978, Morgan filed a pro se motion for discharge from the accusation made in the indictment, asserting that the state's failure to afford him a "prompt first appearance" under Florida Rule of Criminal Procedure 3.130(b) and its failure to afford him a probable cause determination under Florida Rule of Criminal Procedure 3.131 and to cite a case of Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), had denied him due process of law. The trial judge denied the motion without a hearing and declared in his order that he would not consider any more pro se motions of the defendant.

Upon appeal, the Florida Supreme Court affirmed the trial court's judgment and sentence (A-1-7), and denied rehearing (A-8).

REASONS FOR GRANTING THE WRIT

I.

THE PROCEDURE OF SECTION 921.141, FLORIDA STATUTES IS UNCONSTITUTIONAL AS APPLIED TO MORGAN IN THE TRIAL COURT BECAUSE THE JUDGE AND JURY WERE PRECLUDED FROM CONSIDERING THE INDEPENDENT MITIGATING WEIGHT OF THE EVIDENCE WHICH PETITIONER PRESENTED AS THE BASIS FOR A SENTENCE OF LESS THAN DEATH.

Before presenting evidence to the jury during the penalty phase of Morgan's trial, Morgan raised the due process challenge to the aggravating and mitigating circumstances under Section 921.141, Florida Statutes (1977), on the grounds that "they do not adequately define, to the jury, what it is they are to consider as aggravating circumstances and mitigating circumstances" (R-647). That is, the death penalty statute as applied to Morgan violates the Eighth and Fourteenth Amendments to the United States Constitution because it severely limited the scope of mitigation which the jury and judge could consider in determining whether he should live or die.

The Florida Supreme Court, however, rejected this position:

> We have specifically held, however, that Section 921.141 and the procedure utilized thereunder are in keeping with the principles of Lockett [v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).]

The penalty phase of trial took place on June 15, 1978; and on July 3, 1978, the United States Supreme Court handed down its decisions in Lockett, supra, and Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978), which hold that the Eighth and Fourteenth Amendments require that in all but the rarest capital cases, the sentencer must not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death.

Apparently contrary to the holding of Lockett, the Florida Supreme Court in an earlier case, Cooper v. State, 336 So.2d 1139 (Fla. 1976) said that the mitigating circumstances

to be considered by the judge and jury were limited to those in the statute:

> In any event, the legislature chose to list the mitigating circumstances which it chose to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.
>
> (Emphasis added.) 336 So.2d at 1139.

Nevertheless, in a later case, Songer v. State, 365 So.2d 696 (Fla. 1978), the Florida Supreme Court tried to reconcile Cooper with this Court's holding in Lockett:

> As concerned the exclusivity of the list of mitigating factors in Section 921.141, the wording itself, and the construction we have placed on that wording on a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive. This was noted, in fact, in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913.

Despite such hindsight determination from the Florida Supreme Court, the language of Cooper was a clear indication that the statutory list of mitigating circumstances was exhaustive. Following the language in Cooper, however, resulted in the use of procedures in this case which have limited the jurys' and judges' consideration of evidence in mitigation; if it does not fit one of the enumerated mitigating circumstances under the statute it is ignored by the judge and jury. Further, the Court's holding in Cooper indicated that the death penalty was mandatory if no mitigating circumstances were found, a procedure held unconstitutional in Lockett, supra. In Cooper the Florida Supreme Court said:

> In this case there were three aggravating and no mitigating circumstances. There is no alternative to the death penalty.
>
> 336 So.2d at 1142.

In this case, the Florida Standard Jury Instructions for the death penalty phase of a capital trial do not inform the jury that they could consider in mitigation of

a death sentence aspects of the defendant's character and record falling outside of the statutory mitigating circumstances (R-707-708). In particular, Morgan showed that (1) although he was under a sentence of imprisonment at the time of the capital felony, such was his first and only conviction of crime, he was incarcerated as a first offender; (2) that his sentence of imprisonment was not for a term of life imprisonment; (3) that Morgan was a trustee at the time of the capital felony and his prior prison record had been excellent; (4) that he had worked hard to educate himself and take advantage of the rehabilitation offered while in prison; (5) that he had suffered from identifiable psychological problems of dealing with his anger, aggression, feelings of inadequacy and feared his own inability to control his rage and that had the prison provided proper treatment of intense psychotherapy for him as recognized and recommended by prison authorities in 1975, that this offense possibly would not have happened; (6) that Morgan had served his country with the army in Vietnam; (7) that Morgan had been commended by Governor Askew for his quick and decisive action that allowed guards at Florida State Prison to escape from danger during the garment factory riots in April of 1973 (R-659-671).

Although appellant was allowed to show this evidence to the jury, the jury was not given proper instruction or guidance concerning what consideration they could give this evidence; the standard instructions by which the jury was informed of the law to be applied directed the jury that "the mitigating circumstances you may consider, if established by the evidence are as follows:" (A list of the statutory mitigating circumstances under Section 921.141) (R-707-708). This statutory scheme as applied to Morgan denied him due process of law because the jury was not given guidance through instructions as to what use it could make of the evidence offered in mitigation by him.**

** Florida has since changed that instruction to read: Among the mitigating factors which you may consider, if established by the evidence, are: (a list of the statutory mitigating circumstances under Section 921.141).

This Court, moreover, has recognized that inadequate jury instructions are a particularly sensitive problem in death cases. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 589 (1976):

> When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in Furman.
>
> But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. (Citations omitted.) To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision.
>
> The idea that a jury should be given guidance in its decision making is also hardly a novel position. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other legal course in a legal system that has traditionally operating by following prior precedents in fixed rules of law. See Gasoline Products Company v. Champlin Refining Company, 283 U.S. 494, 498, 51 S.Ct. 513, 75 L.Ed. 1188 (1931) Federal Rules of Civil Procedure 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations. (Emphasis supplied.)

428 U.S. at 191-193.

Here Morgan's jury was improperly limited on the range of mitigating circumstances it could consider. Hence, he was denied due process of law.

II.

THE FLORIDA SUPREME COURT HAS APPLIED FLORIDA'S DEATH PENALTY STATUTE TO MORGAN IN AN ARBITRARY AND CAPRICIOUS MANNER BY UPHOLDING OR FINDING THAT THE MURDER IN THIS CASE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL WHILE REJECTING THE SAME FINDING WHICH USED VIRTUALLY THE SAME LANGUAGE IN ANOTHER CASE.

Since Furman v. Georgia, 408 U.S. 238 (1972) capital sentencing statutes have focused upon eliminating arbitrariness and caprice from capital sentences. Proffitt v. Florida, 428 U.S. 242 (1976). A trial judge, faced with similar circumstances, should impose the same sentence, whether it be death or life in prison. Id. at 253. Thus, on its face, Florida's capital sentencing statute has withstood constitutional scrutiny because:

> ...in Florida...it is now no longer true that there is 'no meaningful basis for distinguishing the few cases in which [the death penalty] is now imposed from the many in which it is not.'
>
> Id. citing Gregg v. Georgia, 428 U.S. 153, 188 (1976).

In this case, the trial court found that the murder was especially heinous, atrocious, or cruel. Section 921.141(5)(h), Florida Statutes (1979):

> THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. "HEINOUS" MEANS EXTREMELY WICKED OR, SHOCKINGLY EVIL. "ATROCIOUS" MEANS OUTRAGEOUSLY WICKED AND VILE. "CRUEL" MEANS DESIGNED TO INFLICT A HIGH DEGREE OF PAIN, UTTER INDIFFERENCE TO OR ENJOYMENT OF THE SUFFERING OF OTHERS; PITILESS.
>
> Defendant's senseless killing of his fellow inmate was extremely offensive and cruel and demonstrated total disregard for the life and safety of his victim. It was especially cruel because the victim had been denied his right to live and his right to return to society, his family and friends after satisfying his societal debt for the crime for which he was in prison. The fact that he was an inmate makes his life no less precious than that of any other citizen in a free society. Furthermore, one confined to a penal institution has little or no opportunity to flee from or exercise the right of self defense against

> homocidal assaults such as that seen here. It is the Court's opinion there are very strong aggravating circumstances under this condition.

In another prison stabbing unrelated to this case coming from a neighboring prison, Demps v. State, 395 So.2d 501 (Fla. 1981), the trial court used virtually the same language to find that murder to be especially heinous, atrocious, or cruel:

> THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. "HEINOUS" MEANS EXTREMELY WICKED OR SHOCKINGLY EVIL. "ATROCIOUS" MEANS OUTRAGEOUSLY WICKED AND VILE. "CRUEL" MEANS DESIGNED TO INFLICT A HIGH DEGREE OF PAIN, UTTER INDIFFERENCE TO OR ENJOYMENT OF THE SUFFERING OF OTHERS; PITILESS.
>
> Defendant Demps' senseless killing of his fellow inmate was extremely offensive and cruel and demonstrated a total disregard for the life and safety of victim Alfred Sturgis. It was especially cruel because the victim has been denied his right to live and his right to return to society, his family and friends after payment for the crime he committed which resulted in his imprisonment; and the fact that he was an inmate does not make his life any less precious than any citizen in a free society.
>
> It is the Court's opinion there are very strong aggravating circumstances under this condition.
>
> Id. at 505.

The similarity of findings, however, is not the error. The problem presented by this case stems from the opposite treatment the Florida Supreme Court gave each aggravating factor. In Demps, the Supreme Court rejected this factor:

> We do not believe this murder to have been so "conscienceless or pitiless" and thus "set apart from the norm of capital felonies" as to render it "especially heinous, atrocious, or cruel." See Lewis v. State, 377 So.2d 640 (Fla.1979); Cooper v. State, 336 So.2d 1133 (Fla.1976); Tedder v. State, 322 So.2d 908 (Fla.1975).
>
> (Footnotes omitted.) Id. at 506.

Yet, in this case, the Florida Supreme Court said:

> Under established precedent interpreting the capital felony sentencing law, the third aggravating circumstance (heinous, atrocious, or cruel) is also supported. The evidence showed that the death was caused by one or more of ten stab wounds inflicted upon the victim by appellant. See Rutledge v. State, 374 So.2d 975 (Fla.1979), cert.denied, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Foster v. State, 369 So.2d 928 (Fla. 1979), cert.denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Washington v. State, 362 So.2d 658 (Fla.1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L. Ed.2d 666 (1979).

Surely there is nothing more arbitrary than to reject the same factor in one case, yet accept it in another when no distinction is apparent in the Court's findings in the two cases.

The Florida Supreme Court, however, on its own, found the murder to be heinous, atrocious, or cruel, because Morgan stabbed the victim ten times. Yet Morgan had no notice that this murder was especially heinous, atrocious, or cruel because of the stab wounds, and it was unfair of the Florida Supreme Court to find this aggravating factor applied to him for reasons different than those found by the trial court. Presnell v. Georgia, 439 U.S. 14 (1978). As the Supreme Court has said, its function is only to review, not to reweigh or reevaluate the evidence presented supporting the aggravating or mitigating factors. Brown v. Wainwright, 392 So.2d 1326,1331 (Fla. 1981).

Thus, as applied to Morgan, Florida's capital sentencing scheme has not provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Godfrey v. Georgia, 446 U.S. 420 (1980).

CONCLUSION

For the reasons stated, Morgan asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Chief, Appellate Division
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

NO. 82-5519

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

FLOYD MORGAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

FLOYD MORGAN, petitioner in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Counsel for Petitioner

(Member of the Bar of this Court)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Mr. Floyd Morgan, #029689, Post Office Box 747, Starke, Florida, 32091; and by hand delivery to Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 4th day of October, 1982.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

FLOYD MORGAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

I, FLOYD MORGAN, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to the redress I seek in said cause.

Floyd Morgan
FLOYD MORGAN

STATE OF FLORIDA

COUNTY OF BRADFORD

The foregoing affidavit of FLOYD MORGAN was subscribed and sworn to before me this 28 day of Sept 1982, 1982.

J W Warren
NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 4, 1982

APPENDIX

Floyd MORGAN, Appellant,

v.

STATE of Florida, Appellee.

No. 54939.

Supreme Court of Florida.

March 18, 1982.

Rehearing Denied July 9, 1982.

Defendant was convicted in the Circuit Court in and for Union County, Theron A. Yawn, Jr., J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that: (1) the trial court complied with the requirement of certification of the "entire record" by certifying the reported and transcribed materials along with all documents of record; (2) the trial court adequately inquired into the voluntariness of defendant's confession by holding a hearing outside presence of the jury on such question; (3) the trial court properly denied defendant's motion to exclude employees of the state prison system from service on the jury; (4) the trial court erred in sustaining State's objection to a question asked on cross-examination of State witness as to whether he had ever made other knives while in prison, but such error was harmless; and (5) the sentence of death was properly imposed.

Affirmed.

1. Criminal Law ⇐1086.1, 1166.13

In prosecution for murder in which defendant was sentenced to death, trial court complied with statutory requirement of "certification by the sentencing court of the entire record" by certifying reported and transcribed materials along with all documents of record, and fact that parts of the proceedings were not reported did not prejudice defendant's appeal. West's F.S.A. § 921.141(4); West's F.S.A. Rules App. Proc., Rule 9.200.

2. Criminal Law ⇐577.16(6)

In prosecution for murder, trial court did not commit reversible error in denying defendant's pro se motion to discharge without holding a hearing on possibility of an intentional and prejudicial delay of prosecution, in that his motion was not effective to raise issue of denial of due process resulting from four-month delay between crime and the indictment. U.S.C.A.Const. Amends. 5, 6, 14.

3. Constitutional Law ⇐266.1(5)
Criminal Law ⇐519(1)

In prosecution for murder, trial court did all that was required to protect defendant's rights under Fifth Amendment by holding a hearing outside presence of jury on question of voluntariness of defendant's confession, and court correctly determined the confession to be admissible. U.S.C.A. Const.Amend. 4.

4. Jury ⇐82(3)

In prosecution for murder, trial court did not err in denying defendant's motion to exclude employees of state prison system from service on the jury. West's F.S.A. §§ 40.07, 40.07(2).

5. Criminal Law ⇐663

In prosecution for murder, trial court properly refused to allow State witness to make drawing of knife witness said he had made for defendant on a blackboard in response to defense counsel's request on basis that such an illustration could not be preserved and made a part of the record, as that question of what method of cross-examination to allow was a matter for sound discretion of trial court.

6. Witnesses ⇐270(2)

In prosecution for murder, trial court correctly sustained State's objection on ground of relevance to defense counsel's question on cross-examination of State witness, a fellow inmate of defendant, concerning how long witness had been confined at the correctional institute.

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7. Criminal Law ⇐1170½(1)
Witnesses ⇐270(2)

In prosecution for murder, tria
erred in sustaining State's object
ground of relevance to question as
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State witness, inmate who had n
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witness had ever made other knives v
prison; however, error was harmless
in subsequent cross-examination d
counsel asked witness whether he ha
before been asked to make a knife
responded that he had not, and whet
had ever made a knife before and
sponded that he had.

8. Criminal Law ⇐1169.2(1)

When court errs in disallowing e
evidence or a question or series of que
on cross-examination but substantiall
same matters sought to be present
elicited are brought before jury th
other testimony of same or another wi
the error is harmless.

9. Criminal Law ⇐645

In prosecution for murder, trial
did not abuse its discretion in refusi
allow defense counsel to reopen his cl
argument for purpose of commentin
State's failure to call defendant's cell
as a witness.

10. Constitutional Law ⇐57
Criminal Law ⇐1206(1)

Death penalty statute is not unco
tutional on basis that statute regu
matters of criminal trial practice and pr
dure which are exclusively province of
preme Court, in that aggravating and
gating circumstances in such statute
substantive law, and to the extent
statute pertains to procedural matter
was incorporated by reference in rul
criminal procedure promulgated by
preme Court. West's F.S.A. § 921.
West's F.S.A.Const.Art. 5, § 2(a); We
F.S.A. Rules Crim.Proc., Rule 3.780.

11. Criminal Law ⇐986.6(3)

In prosecution for murder in which
fendant, a prison inmate, was sentenced

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rosecution for murder, trial court ommit reversible error in denying t's pro se motion to discharge olding a hearing on possibility of ional and prejudicial delay of pros that his motion was not effective sue of denial of due process result- four-month delay between crime indictment. U.S.C.A.Const. 5, 6, 14.

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⇐270(2)
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7. Criminal Law ⇐1170½(1)
Witnesses ⇐270(2)
In prosecution for murder, trial court erred in sustaining State's objection on ground of relevance to question asked by defense counsel on cross-examination of State witness, inmate who had made a knife for defendant, concerning whether witness had ever made other knives while in prison; however, error was harmless where in subsequent cross-examination defense counsel asked witness whether he had ever before been asked to make a knife and he responded that he had not, and whether he had ever made a knife before and he responded that he had.

8. Criminal Law ⇐1169.2(1)
When court errs in disallowing certain evidence or a question or series of questions on cross-examination but substantially the same matters sought to be presented or elicited are brought before jury through other testimony of same or another witness, the error is harmless.

9. Criminal Law ⇐645
In prosecution for murder, trial court did not abuse its discretion in refusing to allow defense counsel to reopen his closing argument for purpose of commenting on State's failure to call defendant's cellmate as a witness.

10. Constitutional Law ⇐57
Criminal Law ⇐1206(1)
Death penalty statute is not unconstitutional on basis that statute regulates matters of criminal trial practice and procedure which are exclusively province of Supreme Court, in that aggravating and mitigating circumstances in such statute are substantive law, and to the extent that statute pertains to procedural matters, it was incorporated by reference in rule of criminal procedure promulgated by Supreme Court. West's F.S.A. § 921.141; West's F.S.A.Const.Art. 5, § 2(a); West's F.S.A. Rules Crim.Proc., Rule 3.780.

11. Criminal Law ⇐986.6(3)
In prosecution for murder in which defendant, a prison inmate, was sentenced to death, defendant was not entitled to a new sentencing trial on basis that jury that recommended death penalty was made aware of fact that defendant's previous conviction of second-degree murder was obtained pursuant to an indictment for first-degree murder, in that such fact was relevant not only to fully apprise jury of background of defendant's previous conviction, but also to rebut defendant's attempt to show that his history of criminal activity was not significant. West's F.S.A. § 921.141(5)(b).

12. Homicide ⇐354
In prosecution for murder, death sentence was properly imposed based on findings that at time of the murder, defendant was under sentence of imprisonment, that defendant had previously been convicted of a felony involving use or threat of violence, and that the capital felony was especially heinous, atrocious, or cruel. West's F.S.A. § 921.141(5)(a, b, h).

Michael E. Allen, Public Defender and Margaret Good, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

FACTS

Appellant was convicted of the murder of Joe Saylor, who was stabbed to death in his cell in Union Correctional Institute at approximately 2:00 a. m. on July 16, 1977. At the time of the murder, appellant was under a sentence of thirty years imprisonment for second-degree murder.

Glynn Griffin, another inmate, testified that at appellant's request he made a knife for him in the prison shop. At the trial,

Griffin identified a knife as the one he made. The knife was admitted into evidence. Griffin testified further that appellant told him he wanted the knife in order to stab a man who owed him $400 and would not pay.

Dan Helton, one of appellant's cellmates, testified that he, the victim Joe Saylor, and two other prisoners were in their cell in bed and asleep by 12:00 midnight on the night of July 15. Helton testified that he was later awakened by a yell following which a cellmate told him to turn on the light. Then he saw Joe Saylor on the floor covered with blood.

Michael Daly, a prisoner whose cell was nearby, testified that he was sitting at a table in the hall writing a letter that night after most of the other prisoners had gone to sleep. He heard noises from appellant's cell. Then, appellant walked out of the cell. He walked down the hall toward a lavatory. Daly followed him to find out what had happened. In the lavatory, he saw that appellant's right hand was cut on the palm side across the base of the fingers.

William Williamson, who slept in a nearby cell, was reading at 2:00 a. m., he testified, when he heard noises. He went out of his room and saw appellant, whose hand was bleeding. Morgan said, "I killed him."

On the morning of the murder, appellant was interrogated by prison investigators. Inspector Ackett testified that appellant voluntarily made a statement admitting that he committed the murder. That same day, appellant was removed from his residence at Union Correctional Institute and taken to the Lake Butler Reception and Medical Center, where he was confined until September 9, 1977. Then he was transferred to Florida State Prison until his arraignment on January 16, 1978. Appellant was indicted on November 28, 1977, and was represented by counsel at his arraignment.

On May 19, 1978, appellant filed a *pro se* motion for discharge from the accusation made in the indictment, asserting that the state's failure to afford him a "prompt first appearance" under Florida Rule of Criminal Procedure 3.130(b) and its failure to afford him a probable cause determination under Florida Rule of Criminal Procedure 3.131 and the cited case of *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), had denied him due process of law. The trial judge denied the motion without a hearing and declared in his order that he would not consider any more *pro se* motions of the defendant.

Inmate Helton's testimony included reference to Alvin Robitaille, another of appellant's cellmates. Helton testified that Robitaille was present in the cell when the lights were turned on and Saylor's body discovered. Robitaille was listed by the state as a prospective witness, but was never called to testify. At the conclusion of the evidence, the defense had the "middle" closing argument, preceded and followed by the closing remarks of the state's counsel. After the defense made its closing remarks, the court took a ten minute recess. After court reconvened, the defense asked to briefly re-open its closing argument for the purpose of commenting on the state's failure to call Robitaille as a witness. The court denied this request.

ISSUES ON APPEAL OF THE JUDGMENT OF CONVICTION

[1] Appellant contends that the trial court committed reversible error in failing to ensure the reporting and transcription of all of the proceedings below. He argues that the requirement in section 921.141(4), Florida Statutes (1977), of "certification by the sentencing court of the entire record," together with the constitutional requirement of uniformity in capital sentencing which appellate review is designed to ensure, mandate that all proceedings leading to a judgment of conviction of a capital felony be reported, transcribed, and made a part of the record. Appellant points out that his arraignment, a number of pre-trial hearings, and several bench conferences appear not to have been reported.

The state responds by pointing out that all of the court reporter's notes of proceedings before the trial court were t
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the supreme court for review.
argues that this complied with s
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raised this issue and should not
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and the prejudice caused by the

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States v. Lovasco, 431 U.S. 78
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So.2d 692 (Fla. 1st DCA 1977)
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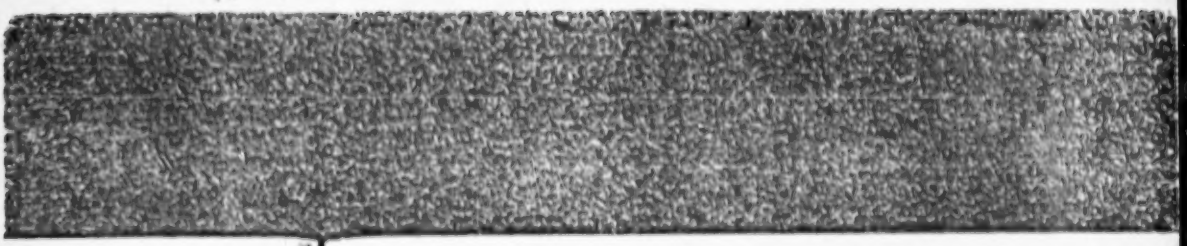

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ings before the trial court were transcribed, made a part of the record, and forwarded to the supreme court for review. The state argues that this complied with section 921.-141(4) and Florida Rule of Appellate Procedure 9.200. We sustain the state's position. By certifying the reported and transcribed materials along with all the documents of record, the court complied with the requirement of certification of the "entire record." The fact that parts of the proceedings were not reported has not prejudiced the appeal in this case.

[2] Appellant contends that the trial court committed reversible error in denying his *pro se* motion to discharge without holding a hearing on the possibility of intentional and prejudicial delay of prosecution. In his testimony on behalf of the state's proffer of appellant's confession, Inspector Ackett testified that following his inculpatory statement, appellant asked to see an attorney. Appellant now argues that the state's delay of over four months in bringing the charge and six months before providing counsel and an appearance before a judicial officer denied him due process of law. He contends that his May 19, 1978 motion raised this issue and should not have been denied without inquiry into the reasons for and the prejudice caused by the delay.

Appellant correctly points out that there are cases where the Due Process Clause is implicated by prosecutorial delay even though neither the defendant's right to a speedy trial nor the applicable statute of limitations are offended. *See United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *State v. Griffin*, 347 So.2d 692 (Fla. 1st DCA 1977), *cert. dismissed*, 358 So.2d 134 (Fla.1978). We do not find, however, that appellant's May 19, 1978 motion was effective to raise the issue of prejudice resulting from the four-month delay between the crime and the indictment occurring the previous summer and fall. If the pre-accusation delay was intentional and prejudiced the defense, and presented an issue of denial of due process, appellant should have moved to dismiss the indictment on that ground as soon as possible after the indictment was returned. Moreover, we find that the delay in the appointment of counsel did not prejudice the appellant.

[3] Appellant contends that the trial court failed to make a sufficiently thorough inquiry into the voluntariness of his confession. In the absence of adequate inquiry, he argues, it was error to admit testimony about the confession and therefore he is entitled to a new trial. Appellant claims that there was an inconsistency between the testimony of the state's witness and the representations of the state's counsel on the question of whether a tape recording of appellant's statement conclusively showed that appellant confessed before asking for an attorney. This argument is without merit. If the tape showed anything that would have raised a question on this issue, appellant could have presented it to the court. The trial court found that the confession was voluntary based on the evidence submitted. The court did not abuse its discretion by not making further inquiry on its own motion. By holding a hearing outside the presence of the jury on the question of the voluntariness of the confession, the court did all that was required to protect appellant's rights under the Fifth Amendment. *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). We find that the court correctly determined the confession to be admissible.

[4] Appellant contends that the trial court erred in denying his motion to exclude employees of the state prison system from service on the jury. His motion was based on the allegation that Union County, where the trial was held, has a disproportionate share of its eligible population in the employ of the state prison system due to the presence of numerous correctional facilities in that region of the state. Appellant argues that section 40.07, Florida Statutes (1977), which disqualifies sheriffs, deputies, and municipal police officers from jury service, should be construed to apply to correctional officers.

We decline to hold that all correctional officers were intended to be included within the classes of persons disqualified from jury service by section 40.07(2). In their briefs, both parties agree that since appellant did not exhaust all his peremptory challenges to prospective jurors, we are not required to consider whether any juror served who should have been excused for cause. *Young v. State*, 85 Fla. 348, 96 So. 381 (1923). Nevertheless, we have reviewed the transcript of jury selection. We are satisfied that all persons selected were qualified; none were subject to challenge for cause.

[5] Appellant presents three instances in which he contends the trial court improperly limited his cross-examination of state witness Glynn Griffin. The first instance had to do with Griffin's testimony about the knife. On direct examination, Griffin described the knife he said he made for appellant. The knife itself had not yet been admitted into evidence. On cross examination, appellant's counsel sought to have the witness make a drawing of the knife on a blackboard. The court refused to allow the blackboard drawing on the ground that such an illustration could not be preserved and made a part of the record. Appellant argues that this ruling prevented effective cross examination and thereby abridged his right to confront the witnesses against him.

The court's ruling on appellant's proposed use of chalk drawings on a blackboard was a limitation on the method, not the substance, of appellant's cross examination of Griffin. Appellant now argues that a blackboard drawing could have been preserved for the record by photographing it. Appellant did not propose this solution in the trial court, however. Nor did he ask that the witness be permitted to draw the knife with pencil and paper. The question of what method of cross examination to allow was a matter for the sound discretion of the trial court and appellant has not shown that the court abused its discretion.

Appellant also contends that the trial court twice more improperly limited cross examination, abridging the right to confrontation of witnesses, when it sustained the state's objections to two questions asked witness Griffin on cross examination. The questions were whether he had ever made other knives while in prison and how long he had been incarcerated at Union Correctional Institute.

[6] With regard to the question of how long Griffin had been confined at Union Correctional Institute, we hold that the trial court was correct in sustaining the state's objection on the ground of relevance. Appellant argues that information on the seriousness of the crime for which Griffin had been imprisoned, and inferences about how much of his sentence remained to be served, would have been relevant to show his interest in cooperating with the state. We do not see the relevance. The defense was allowed to impeach Griffin's credibility in the standard fashion. Thereby it was brought out that he had been convicted of crimes three times. The length of his past incarceration at Union Correctional Institute was irrelevant to any material issue and the objection was properly sustained.

[7,8] With regard to the question whether Griffin had ever made a knife before, however, we believe the defense inquired into a relevant matter. Since it was established that Joe Saylor was stabbed to death, the fact that Griffin may have made other knives was just as relevant as was the fact that he made one for appellant. Therefore the trial court erred in sustaining the state's objection on the ground of relevance. However, the error was harmless. In subsequent cross examination defense counsel asked Griffin whether he had ever before been asked to make a knife and he responded that he had not. Defense counsel asked him whether he had ever made a knife before and he responded that he had. Thus the defense was permitted to ask substantially the same question that had earlier been disallowed and the court's earlier error was cured. When the court errs in disallowing certain evidence or a question or series of questions on cross examination but substantially the same matters sought to be presented or elicited are brought before the jury through other testimony of the same or another witness, harmless. *Palmes v. State*, 39 (Fla.1981); *Denmark v. State*, 116 So. 757 (1928); *Bak* 41, 11 So. 492 (1892), *overru Tipton v. State*, 97 So.2d 27

[9] Appellant contends th court abused its discretion in allow defense counsel to reope argument for the purpose of on the state's failure to call ap mate Robitaille as a witness. points out that the testimony of placed Robitaille in the room at the murder. Therefore, he a aille was almost certainly a knowledge of material facts. T such a person was not called appellant claims, was a proper comment by defense counsel.

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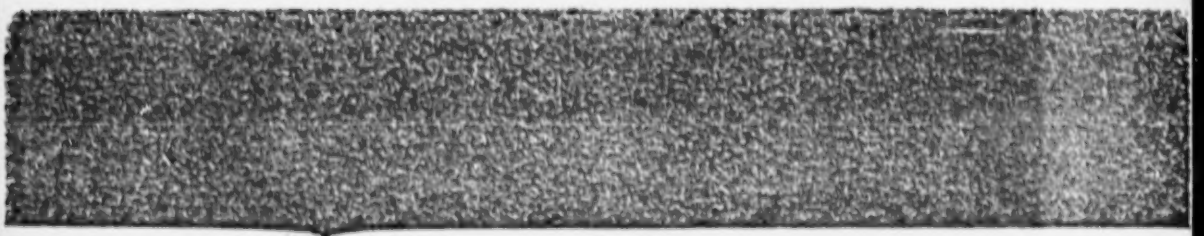
SENTENCE

[10] Appellant contends th tence of death must be vacat section 921.141, Florida Stat pursuant to which the senten posed, is unconstitutional. He the statute seeks to regulate



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[9] Appellant contends that the trial court abused its discretion in refusing to allow defense counsel to reopen his closing argument for the purpose of commenting on the state's failure to call appellant's cellmate Robitaille as a witness. Appellant points out that the testimony of Dan Helton placed Robitaille in the room at the time of the murder. Therefore, he argues, Robitaille was almost certainly a person with knowledge of material facts. The fact that such a person was not called to testify, appellant claims, was a proper subject for comment by defense counsel.

The court denied the request for reopening of defense counsel's argument on the ground that since the defense could have called Robitaille as easily as could have the state, the comment defense counsel wished to make would have been improper.

We agree with appellant that the fact that Robitaille was not produced as a witness was a matter "within the bounds of that considerable degree of latitude which is allowed counsel in argument." *Pell v. State*, 97 Fla. 650, 661, 122 So. 110, 114 (1929). Had defense counsel managed to make an appropriate comment within the time allotted to him for argument, the comment would have been permissible. The court was not obliged, however, to interrupt the orderly flow of the trial to afford the defense a second opportunity to bring the matter to the attention of the jury. The trial court's ruling should not be held to require reversal unless "clearly erroneous and prejudicial." *Id.* at 662, 122 So. at 115.

SENTENCE

[10] Appellant contends that his sentence of death must be vacated because section 921.141, Florida Statutes (1977), pursuant to which the sentence was imposed, is unconstitutional. He argues that the statute seeks to regulate matters of criminal trial practice and procedure, which are exclusively the province of this Court under the rule-making power assigned to it by article V, section 2(a), Florida Constitution.

This argument is without merit. The aggravating and mitigating circumstances enumerated in section 921.141 are substantive law. *Vaught v. State*, 410 So.2d 147 (Fla.1982); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, *Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

> The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., [*sic*] actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

Id. at 9. To the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases, it has been incorporated by reference in Florida Rule of Criminal Procedure 3.780, promulgated by this Court, and is therefore properly adopted. *See The Florida Bar, Re Florida Rules of Criminal Procedure*, 343 So.2d 1247, 1263 (Fla.1977).

Appellant contends that section 921.141 is unconstitutional as applied to him because the judge and jury were precluded from giving proper consideration to the evidence he offered in mitigation of his crime. He argues that the procedure utilized at his sentencing trial pursuant to section 921.141 prevented the judge and jury from assigning the proper weight to his mitigating evidence and that this violated principles of the Eighth and Fourteenth Amendments developed in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). We have specifically held, however, that section 921.141 and the procedure utilized thereunder are in keeping with the principles of *Lockett*. *Songer v. State*, 365 So.2d 696 (Fla.1978) (on rehearing), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

[11] Appellant contends that he is entitled to a new sentencing trial because the jury that recommended the death penalty was made aware of the fact that appellant's previous conviction of second-degree murder, for which he was serving a thirty-year sentence at the time of the instant murder, was obtained pursuant to an inglictment for first-degree murder. Appellant argues that apprising the jury of this fact violated the principles of *Elledge v. State*, 346 So.2d 998 (Fla.1977) and *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1069 (1977), which hold that only convictions, and not mere accusations, may be presented to establish the statutory aggravating circumstance of previous conviction of violent crime. *See* § 921.141(5)(b), Fla.Stat. (1977).

The rule of *Provence* that "mere arrests or accusations" may not be considered as factors in aggravation does not require a new sentencing trial in this case. Here there was no "mere" accusation that had not led to a conviction. There was an accusation of first-degree murder that led to a conviction for second-degree murder. This was relevant not only to fully apprise the jury of the background of appellant's previous conviction, it was also relevant to rebut appellant's attempt to show that his history of criminal activity was not significant. Furthermore, we note that appellant did not object to allowing the previous indictment to go to the jury at the time it was introduced, but raised the issue for the first time in his motion for new trial. We perceive no error.

[12] Finally, appellant contends that the trial court erred in its evaluation of the circumstances of this case and that the sentence of death is simply inappropriate. The judge found that at the time of the murder, appellant was under sentence of imprisonment, § 921.141(5)(a), Fla.Stat. (1977); that appellant had previously been convicted of a felony involving the use or threat of violence, *id.*, § 921.141(5)(b); and that the capital felony was especially heinous, atrocious, or cruel, *id.*, § 921.141(5)(h). The first two aggravating circumstances found were amply supported by evidence of appellant's incarceration and documentation of his previous judgment of conviction of second-degree murder, rendered on an indictment for first-degree murder. Under established precedent interpreting the capital felony sentencing law, the third aggravating circumstance is also supported. The evidence showed that death was caused by one or more of ten stab wounds inflicted upon the victim by appellant. *See Rutledge v. State*, 374 So.2d 975 (Fla.1979), *cert. denied*, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); *Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979).

The trial judge found that there were no mitigating circumstances. We uphold this finding against appellant's contentions of error. The jury recommended that a sentence of death be imposed. We hold that under these circumstances, the death sentence is proper.

The judgment and sentence are affirmed.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

Frederick W. CHAPMAN and Liberty Mutual Insurance Company, Appellants,

v.

Dennis P. DILLON, Jr., etc., Dennis P. Dillon, and Aurelia M. Dillon, etc.

No. 61013.

Supreme Court of Florida.

March 18, 1982.

Rehearing Denied July 7, 1982.

Action was brought by parents and minor child to recover for injuries child sustained in automobile acciden Court, Brevard County, Virg J., found provisions of 1979 ance law to be constitutional, appealed. The District Cou 404 So.2d 354, reversed, and pealed. The Supreme Court, that: (1) regardless of actu recovery, injured person will payment for his major and s losses even when he himself thus 1979 no-fault provisions constitutional right of access legislature's no-fault objectiv prompt recovery of expense tracted litigation are still b thus no-fault personal inju benefits, tort liability exemp ductibles do not deny due pr no-fault threshold provisions, some sort of permanent injur for pain and suffering can b not unconstitutionally deny equal protection.

Decision of District Cou reversed and case remanded tions.

Overton, J., filed a conc

Sundberg, C. J., filed a curring in part and dissenti which Adkins, J., joined.

1. Automobiles ⇐251.12

Since regardless of actu recovery, an injured person prompt payment for his maj economic losses even when h fault, and since lowering pe protection benefits and incre of permitted optional deductib necessarily result in reduced and increase litigation, no-fa still provide reasonable alterna tional action in tort, and thus benefits and raising permissib did not violate constitutional right of access to the courts. §§ 627.736(1), 627.737, 627.7

2. Automobiles ⇐251.12
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IN THE SUPREME COURT OF FLORIDA

FRIDAY, JULY 9, 1982

FLOYD MORGAN, **

Appellant, ** CASE NO. 54,939

vs. ** Circuit Court Case No. 77-141-CF (Union)

STATE OF FLORIDA, **

Appellee. **

On consideration of the motion for rehearing filed by attorney for appellant, and reply thereto

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

C
cc: Hon. Margie Cason, Clerk
Hon. Theron A. Yawn, Jr., Judge

Melanie Ann Hines, Esquire
Raymond L. Marky, Esquire

SECTION 921.141, FLORIDA STATUTES (1977)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defenant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

CASE NO. 82-5519

IN THE

SUPREME COURT OF THE UNITED STATES

FLOYD MORGAN,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

SECTION 921.141, FLA.STAT., WAS NOT UNCONSTITUTIONALLY APPLIED TO PETITIONER NOR WAS THE JURY OR SENTENCING JUDGE RESTRICTED IN CONSIDERING EVIDENCE REGARDING THE CHARACTER OF THE DEFENDANT AS MITIGATING EVIDENCE.

THE SUPREME COURT DID NOT ERR IN UPHOLDING THE FINDING OF THE SENTENCER THAT THE HOMICIDE IN THIS CASE WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL AND THE JUDGMENT AND SENTENCE OF DEATH IS NOT CONSTITUIONALLY DEFECTIVE.

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PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved found on pages one and two of the petition. Respondent does not accept the Questions Presented, as stated by petitioner and has accordingly restated them.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as stated on pages two and three of the petition as being accurate to the extent stated. Additional facts relevant to a disposition of the issue presented will be included in the argument portion of the response as those facts bear upon the specific question to be decided.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED, OR IF GRANTED, WHY THE JUDGMENT AND SENTENCE SHOULD BE SUMMARILY AFFIRMED

I

SECTION 921.141, FLA.STAT., WAS NOT UNCONSTITUTIONALLY APPLIED TO PETITIONER NOR WAS THE JURY OR SENTENCING JUDGE RESTRICTED IN CONSIDERING EVIDENCE REGARDING THE CHARACTER OF THE DEFENDANT AS MITIGATING EVIDENCE.

Petitioner, citing to and quoting from *Cooper v. State*, 336 So.2d 1139 (Fla.1976), contends that Section 921.141, Fla. Stat., was unconstitutionally applied to him because the judge and jury were precluded from considering nonenumerated mitigating circumstances as required by *Lockett v. Ohio*, 438 U.S. 586 (1978). Petitioner also argues that Florida's Standard Jury Instructions also restricted the judge and jury in what could be considered.

Respondent submits that the petition is frivolous as a matter of law and that the writ of certiorari should be denied or, if granted, the judgment and sentence should be summarily affirmed.

Counsel for petitioner candidly acknowledges that he was allowed to introduce evidence of nonenumerated mitigating circumstances by the trial judge (Pet. at p. 6; Resp. App. pps 28-38) but urges ". . . the jury was not given proper instruction or guidance concerning what consideration they could give the evidence. . . ." What counsel for petitioner neglects to point out to this Court, however, is that counsel did not voice any objection to these instructions in accordance with Florida's rule of procedure which requires an individual to object ". . . before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. . .", Fla.R.Crim.P. 3.390(d), in order to raise the matter on appeal. See also: *McCaskill v. State*, 344 So.2d 1276 (Fla.1977). This omission is clear from respondent's appendix and was asserted by respondent on the direct appeal in the Florida Supreme Court. The Florida Supreme Court in its opinion did not address the alleged defects in the jury instructions given in this case and this Court, under *Webb v. Webb*, 451 U.S. 493 (1981), must assume the Florida Supreme Court did not reach this claim because it was not properly raised and presented in the trial court. *Webb v. Webb, supra*, n. 4 at 498. In other words, there is an independent and adequate state ground that pretermits a consideration of the federal claim by this Court. See also: *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Thus this Court has no jurisdiction to consider the alleged defects in the jury instructions.

Petitioner did properly assert in the trial court that §921.141, Fla.Stat., was unconstitutionally vague and overbroad because it does not adequately define to the jury what it is they are to consider as aggravating circumstances and mitigating circumstances (Resp. App. A, at p. 13). The trial judge rejected the argument because that had been rejected by both this Court and the Florida Supreme Court (Resp. App. A, at p. 13). Even though counsel successfully argued that under this Court's decisions in *Gregg v. Georgia*, 428 U.S. 153 (1976) he was ". . . allowed to

offer any and all mitigating circumstances that I might choose to argue to the jury in consideration of the penalty that they might advise on to the Court. . ." (Resp. App. A, at p. 14), and did in fact introduce and argue the existence of nonenumerated mitigating circumstances (Resp. App. A, at p. 14-17), 26-37, 53-69), the Florida Supreme Court decided petitioner's claim that §921.141, Fla.Stat., was unconstitutional because it allegedly restricted a consideration of the mitigating circumstances. The court in its opinion rejected the claim that §921.141 restricted the sentencer from considering mitigating circumstances to those enumerated in subsection (6)(a) through (g). The Court said:

> Appellant contends that section 921.141 is unconstitutional as applied to him because the judge and jury were precluded from giving proper consideration to the evidence he offered in mitigation of his crime. He argues that the procedure utilized at his sentencing trial pursuant to section 921.141 prevented the judge and jury from assigning the proper weight to his mitigating evidence and that this violated principles of the Eighth and Fourteenth Amendments developed in Lockett v. Ohio, 438 U.S. 586 (1978). We have specifically held, however, that section 921.141 and the procedure utilized thereunder are in keeping with the principles of Lockett. Songer v. State, 365 So.2d 696 (Fla.1978) (on rehearing), cert.denied, 441 U.S. 956 (1979).

415 So.2d at 11.

In *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert.denied*, 441 U.S. 956 (1979), the Florida Supreme Court rejected the identical argument raised herein, relying on *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert.denied*, 440 U.S. 976 (1979), and said:

> In *Lockett*, the Court held that Ohio's death penalty statute, which restricts the sentencing judge's consideration to the statutory list of mitigating factors, violates the eighth and fourteenth amendments to the United States Constitution. Appellant asserts that Florida's statute similarly prescribes an exclusive list of mitigating circumstances, relying principally on language from our decision in *Cooper v. State*, 336 So.2d 1133 (Fla.1976), to the effect that unlisted mitigating circumstances should not be considered in sentencing for a capital crime.
>
> In *Cooper*, this Court was concerned not with whether enumerated factors were being raised as mitigation, but with whether the evidence offered was probative. Chief Justice Burger, writing for the majority in *Lockett*, expressly stated that irrelevant evidence may be excluded from the sentencing process. 98 S.Ct. at 2965 n.12. Cooper is not apropos to the problems addressed in *Lockett*.

> *As concerns the exclusivity of the list of mitigating factors in Section 921.141, the wording itself, and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive.* This was noted, in fact, in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).
>
> We have approved a trial court's consideration of circumstances in mitigation which are not included on the statutory list in *Washington v. State*, 362 So.2d 658 (Fla.1978); *Buckrem v. State*, 355 So.2d 111 (Fla.1978); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla. 1976); *Meeks v. State*, 336 So.2d 1142 (Fla.1976); *Messer v. State*, 330 So.2d 137 (Fla.1976); and *Halliwell v. State*, 323 So.2d 557 (Fla.1975), among others. Obviously, our construction of Section 921.-141(6) *has been* that *all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered.* This construction of the statute, and its continued validity, were noted most recently in *Spinkellink v. Wainwright*, 578 F.2d 582, 620-21 (5th Cir.1978), where the court was presented with an identical challenge to our death penalty statute based on *Lockett v. Ohio*.

365 So.2d at 700. See also: *Spinkellink v. Wainwright, supra*, 620-621.

Of course, the Florida Supreme Court's construction of §921.141, which is consistent with this Court's interpretation of it in *Proffitt v. Florida*, 428 U.S. 242 (1976) is binding. *Wainwright v. Stone*, 414 U.S. 21 (1973).

The claim that the statute was unconstitutionally applied to petitioner is utterly without merit as a matter of fact. *Cooper v. State*, 336 So.2d 1133 (Fla.1976) to the contrary notwithstanding, the record demonstrates that the petitioner, just like Mr. Spinkellink, was afforded, and exercised, without limitation, every opportunity to set forth any and all mitigating factors which he wanted to introduce. (Resp. App. A, p. 28-37). These included a letter from his mother stating he suffered an injury when he was a child, that he served in Vietnam ten years earlier and that he suffered a head injury requiring hospitalization in 1969 (Resp. App. A, p. 29-30); a letter from a psycologist concerning his evaluation of petitioner that demonstrated his potential for rehabilitation through therapy (Resp.App. A, p. 28-29); a request by petitioner

that he be given vocational training and educational opportunities (Resp. App. A, p. 30-31); a letter from Alcoholics Anonymous indicating petitioner's successful performance in that program (Resp. App. A, p. 32); a copy of petitioner's Reclassification and Progress Report showing he presented no disciplinary problems as of 1972 and that his prognosis at that time was good (Resp. App. A, p. 32-33); a copy of Certificate of Achievement issued prior to the homicide opining that petitioner that ". . . possibly, after intensive therapy, he would not be a menace to society upon release. . ." (Resp. App. A, p. 34); a psychological evaluation of petitioner dated December 3, 1975, showing psycological deficiencies (Resp. App. A, p. 35-36); a Reclassification and Progress Report issued in September 1976 showing successful educational achievement and recommending that his custody be reduced to minimum (Resp.App. A, p. 36); and a letter from the then Governor of the State of Florida commending petitioner for his actions several years earlier in response to a prison disturbance which prevented further injury to institutional personnel (Resp. App. A, p. 36-37).

As could be expected counsel argued these factors to the jury in mitigation (Resp.App. A, p. 54-70). He also argued that the death penalty was not a deterent and retribution should not be considered (Resp. App. A, p. 55). Indeed counsel told the jury, without objection by the State, that ". . . you are the only ones to decide mitigation in this case, mitigation in whatever form you find it. . ." (Resp. App. A, p. 63).

There is simply no support for petitioner's claim that §921.141, Fla.Stat., as it was applied to him, limited the introduction of nonenumerated mitigating circumstances for the sentencer's *consideration* in violation of *Lockett v. Ohio, supra.*

Even if this Court were to consider the unpreserved challenge to the jury instructions, petitioner cannot prevail. The instructions to the jury given in this case track the language of

the *statute*, and amplify the definition of "especially heinous, atrocious or cruel" (Resp. App. A, p. 71-76). If the instructions track the statute, under *Proffitt* itself, they do not restrict consideration of factors in mitigation. The Supreme Court of Florida has so held in a number of cases. *Demps v. State*, 395 So.2d 501 (Fla.1981); *Peek v. State*, 395 So.2d 492 (Fla.1980) and *Songer v. State, supra*. The instructions, as reflected by the record, quite accurately told the jury that the *aggravating* circumstances they could consider were *limited* to those listed; did not tell them they were limited as to what could be considered as mitigating evidence; and that ". . . if one or more aggravating circumstances are established, you should consider *all the evidence* tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed. . ." (Resp. App. A, p. 74-75).

Should this Court conclude a substantial federal question has been presented then respondent submits it should grant the writ and summarily affirm on the basis of the record and the authorities cited herein.

II

THE SUPREME COURT DID NOT ERR IN UPHOLDING THE FINDING OF THE SENTENCER THAT THE HOMICIDE IN THIS CASE WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL AND THE JUDGMENT AND SENTENCE OF DEATH IS NOT CONSTITUTIONALLY DEFECTIVE.

Petitioner, citing to *Demps v. State, supra*, and this Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), contends his sentence of death is unconstitutional because the finding that the homicide was "especially heinous, atrocious and cruel in this case is contradictory to the finding in an unrelated case not before this Court and thus arbitrary and capricious.

Respondent submits petitioner is incorrect both in fact and in law and that, even if the Supreme Court was wrong in upholding the finding, the judgment and sentence would not be invalid under the Constitution of the United States.

In the instant case the victim was stabbed to death in a darkened cell. He was *repeatedly* stabbed--ten times to be exact. The physical and documentary evidence was such that the jury could infer that the initial assault was unsuccessful and merely awakened the victim. That evidence also permitted the jury to infer the victim attempted to ward off the lethal blow. This was in fact argued to the jury by the prosecutor (Resp.App. B, p. 1-3). Thus there was evidence to support a conclusion the victim had cognition of impending death. The Florida Supreme Court has repeatedly held that homicides involving multiple stabbings can lawfully be classified as ". . . especially heinous, atrocious and cruel. *Miller v. State*, 332 So.2d 65 (Fla.1976); *Funchess v. State*, 341 So.2d 762 (Fla.1976); *Washington v. State*, 362 So.2d 658 (Fla.1978); *Foster v. State*, 369 So.2d 928 (Fla.1979), the latter two cases being cited to by the Florida Supreme Court in upholding the finding; *Rutledge v. State*, 374 So.2d 975 (Fla. 1979); *Booker v. State*, 397 So.2d 910 (Fla.1981); and *Straight v. State*, 397 So.2d 903 (Fla.1981). *Demps v. State, supra*, is the only case where the Florida Supreme Court has overruled a finding of heinous, atrocious and cruel where multiple stabbing was the method employed by the perpetrator and that decision is obviously wrong. The Court in overruling the sentencer's finding in *Demps* cited to *Cooper v. State, supra*, which like *Godfrey* involved instaneous death by a single gunshot where the victim was unaware of impending death or the likelihood that such would occur. That is inopposite to the instant case.

Respondent submits that petitioner is actually arguing that since he has shown this Court a case where the Supreme Court of Florida has rejected a finding under similar facts, his constitutional rights have been violated. This is patently incorrect

for this Court has repeatedly rejected this legal claim. *Howard v. Kentucky*, 200 U.S. 164 (1906); *Milwaukee Electric Railway & Light Co. v. Wisconsin*, 252 U.S. 100 (1920) and *Beck v. Washington*, 369 U.S. 541 (1962).

In *Howard*, this Court clearly held:

> ". . . a 'state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. . .'"

200 U.S. at 173.

Of more importance, this Court in *Beck v. Washington*, *supra*, where the petitioner specifically alleged a misapplication of state law--the claim presented herein--denied him equal protection of the law guaranteed by the Constitution, said:

> . . . petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .

citing to *Milwaukee Electric*, *supra*, 369 U.S. at 555. In other words, the mere fact that a tribunal reaches different conclusions[1] in two different cases does not establish a denial of equal protection, unless there is shown an element of intentional or purposeful discrimination. *Delia v. Court of Common Pleas of Cuyahough County*, *supra*, at 206; cf. *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978) at 602-606, citing to *Provence v. State*, 337 So.2d 783, 787 (Fla.1976) wherein the Florida Supreme Court recognized reasonable persons can differ on legal conclusions.

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1 It should be noted that in *Dempa* while the aggravating circumstance was found not supported by the evidence the ultimate sentence of death was *sustained* meaning both killers received equal punishment.

Respondent submits the only permissible federal question that petitioner can raise is whether a rational trier of fact could lawfully conclude the homicide in this case was "especially heinous, atrocious or cruel." *Godfrey v. Georgia, supra; Jackson v. Virginia,* 443 U.S. 307 (1979).

As has been noted this case is totally unlike *Godfrey* because that involved an instantaneous death from a gunshot wound and the prosecutor acknowledged the crime did not involve either torture or physical injury preceding the death of the victim. Moreover, in *Godfrey* there was no instructions amplifying the general terms of the particular aggravating circumstance. In the instant case the death was not instantaneous, the prosecutor argued the crime was "especially heinous, atrocious or cruel" (Resp.App. A, p. 43) as those terms have been defined, and the trial judge explicitly gave an extended definition of these terms (Resp.App. A, p. 72-73) as in *State v. Dixon,* 283 So.2d 1 (Fla.1973) which was approved by this Court in *Proffitt v. Florida, supra,* at 255, n. 12. The nature of the homicide and the circumstance under which it was committed when viewed in the light most favorable to the prosecution was such that a rational sentencer could lawfully conclude that it was "especially heinous, atrocious and cruel" and this Court, if it determines a federal question is presented, should grant the writ and summarily affirm the judgment and sentence.

Even if the evidence does not support the finding, the judgment and sentence would still not be defective from a constitutional standpoint. There is no question but that the trial judge found three enumerated aggravating circumstanaes were established by the evidence and that no mitigating circumstances existed. Therefore the death penalty is constitutionally appropriate even if the one finding is legally erroneous. *Demps v. State, supra; Brown v. State,* 381 So.2d 690 (Fla.1981) and *Williams*

v. Maggio, 679 F.2d 381 (5th Cir.1982) en banc. In *Maggio*, the Court refused to declare a death sentence unconstitutional grounded upon the fact that it found the evidence was insufficient to support one of the aggravating circumstances found by the jury because there was evidence to support at least one other aggravating circumstance. 679 F.2d at 388-390.

Petitioner's death sentence under either view is not constitutionally infirm and therefore this Court should either deny the writ of certiorari or grant the same and summarily affirm.

CONCLUSION

Respondent respectfully submits that the petition fails to state any substantial federal question meriting further review by this Court. To the extent that the Court concludes otherwise, the State of Florida submits that the decision rendered by the Florida Supreme Court in this cause is clearly correct; that this Court should deny plenary review; and, that it should summarily affirm the decision of the Florida Supreme Court.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 1st day of November 1982.

Raymond L. Marky
Raymond L. Marky
Assistant Attorney General

CASE NO. 82-5519

IN THE

SUPREME COURT OF THE UNITED STATES

FLOYD MORGAN,

PETITIONER,

-VS

STATE OF FLORIDA,

RESPONDENT.

A P P E N D I X

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10

P R O C E E D I N G S

9:30 o'clock a.m.
June 15, 1978

* * *

(Thereupon, at 9:30 o'clock a.m., Thursday, June 15, 1978, court reconvened pursuant to adjournment of the preceding session, and the following further proceedings were had:)

THE COURT: Mr. Bailiff, call court to order.

THE BAILIFF: Court will come to order.

THE COURT: Ladies and gentlemen of the jury, you have found the defendant, Floyd Morgan, guilty of murder in the first degree of Joe Edward Saylor, as charged in the Indictment in Case No. 77-141-CF.

The punishment for this crime is either death or life imprisonment. The final decision, as to what punishment shall be imposed, rests solely with the judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

The State and the defense may now present evidence relative to what sentence you should recommend to the Court.

You are instructed that this evidence, when

considered with the evidence you have already heard, is presented in order that you might determine first, whether or not sufficient aggravating circumstances exist which should justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

At the conclusion you will be instructed on the factors in aggravation and mitigation you may consider.

The State may proceed.

MR. SALMON: Your Honor, may we approach the bench?

THE COURT: You may.

(Discussion at the bench.)

THE COURT: Ladies and gentlemen of the jury, before proceeding with the presentation of additional matters, it is necessary that the Court hear and determine certain matters of law which will be considered out of your presence before we can proceed further.

Therefore, I ask that you withdraw for a few moments to the jury room while these matters are taken care of.

THE BAILIFF: Ladies and gentlemen, just come

this way.

(Thereupon, the jury retired to the jury room and the following further proceedings were had out of the presence of the jury:)

THE COURT: All right. You may state your motion, Mr. Cervone -- I am sorry, Mr. Salmon.

MR. SALMON: Thank you, Your Honor.

At this time, Your Honor, I would make a motion in limine with respect to restricting items that I think are reasonably anticipated that the state attorney might attempt to introduce into evidence at this time.

With respect to aggravating circumstances, as enumerated in Florida Statute 921.141, the first listed aggravating circumstances of capital felony was committed by a person under sentence of imprisonment, and I would move at this time that that be restricted from evidence, in this case, based on the denial of equal protection and also due process grounds.

In support of that, I would submit to the Court that there is no rational distinction for counting this as an aggravating circumstance in a situation where, for example, a person might be imprisoned for the crime of worthless checks or

even something minor as contempt of court, and a person on the street who commits murder.

Also, the converse for a person on the street may have a long and violent past record but, for some reason, is, in fact, on the street.

I would submit to the Court that there is not a rational distinction in counting this as an aggravating circumstance. If, as I understand the aggravating circumstance to be, would be calling for a person who is incarcerated to allow the jury to imply and infer from that that there is some note of aggravation with respect to the present crime.

For those reasons, I would submit that it is unconstitutional and would move that it be stricken from evidence in this case.

With respect to No. "B", the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, I would submit that that cannot be introduced, the earlier conviction of Mr. Morgan cannot be introduced, in this case, as it was, first of all, a conviction not for a capital felony, and also based on the case of Provence v. State, a Supreme Court of Florida case, which is cited at

337 So.2d 783, where the Supreme Court of Florida, I would submit, interpreted Item "B" as not being in the disjunctive, but rather and I quote, Subsection "B" reads:

"The defendant was previously convicted of another capital felony involving the use or threat of violence to the person."

There is no indication there that the Supreme Court of Florida has interpreted that as an aggravating circumstance which might include an offense separate from a capital felony, which is one of violence.

With respect to letter "H", I would submit that the state attorney should not be allowed to present testimony or evidence to the jury, in this case, that this was a capital felony that was especially heinous, atrocious, or cruel.

I would submit to the Court, that both the Legislature and the Supreme Court of Florida, have, in fact, defined those terms as to what they contemplate being admitted in the penalty phase of a first degree murder trial.

I would like to cite to the Court the case of Tedder v. State, 322 So.2d 908.

I do not have a copy of that case but I would

like to read from the supplement from the Florida Statutes Annotated and therein the quote is:

"That the Legislature intended something especially heinous, atrocious, or cruel when it authorized the death penalty for first degree murder."

Further, I would --

THE COURT: Wouldn't that be a jury question, Mr. Salmon?

MR. SALMON: Your Honor, I think that certainly that is a possibility of this Court's ruling.

I would submit, and I have just a couple of other cases that I would like to submit, that they have gone further in this case. The facts are such that this Court can place them within earlier Supreme Court decisions defining the terms "heinous, atrocious and cruel."

Again, in Provence v. State, we have a crime that is quite similar, in fact, very similar wherein knife wounds, accumulating a number of eight, were determined not to be heinous, atrocious or cruel, and an earlier death sentence was overturned by the Supreme Court of Florida and required imposition of the life sentence.

In the case of Alford v. State, again a

Supreme Court case, cited at 307 So.2d 433, the Supreme Court defined the term "heinous," as used in this section in defining aggravating circumstances authorizing the death penalty, those that are extremely wicked, shockingly evil.

The term "atrocious," as used in this section setting forth aggravating circumstances would only authorize the death penalty in those cases where the means used were outrageously wicked and vile.

The term "cruel," as used in this section relating to aggravating circumstances, would be those indicative of the situation where the means used were designed to inflict a high degree of pain with utter indifference or even enjoyment of suffering of others.

Again, the case cited for facts, I think, that are analogous to this case, in Cooper v. State, 336 So.2d 1133, the facts in that case were where a policeman being murdered as a result of two shots being fired directly into the officer's head. The Supreme Court found that this was not especially heinous.

Lastly, Your Honor, I would cite once again from Cooper v. State, again cited at 332 So.2d 1133. Therein, Your Honor, the Court contemplated the

circumstances justifying heinous, atrocious and cruel as those that indicated an unnecessarily torturous act being committed on the victim.

I think, Your Honor, that the Supreme Court of the State of Florida has indicated clearly enough, for this Court's purposes, to restrict the State from presenting this particular crime as one that heinous, atrocious, and cruel and would indicate that it, in fact, does not fall within the terms enumerated in Item "H" under 921.141.

THE COURT: How can I exclude that from the consideration of the jury, Mr. Salmon, when they have already heard the testimony from which, I assume, that the State would ask that that inference be drawn?

MR. SALMON: I agree, Your Honor.

The jury instructions, on the death penalty phase, I think, in fact, covers that, at least impliedly where it says what they may include.

If I can find the language, Your Honor, it is to the effect that they may, indeed, consider the facts heard during the guilt phase of the trial. They will have that within their consideration.

I think, though, there is a distinction between allowing the jury to consider that during the penalty

phase if they should, in fact, do so.

I would analogize it to a jury instruction wherein one party or the other may get something more restrictive or more limited than is actually laid out in the providing statute, but that it cannot be iterated as specified in the statute, and I think that, although if they decide to consider that as they are deliberating on the penalty phase of this trial, and they should come up with that, they should decide that the facts that they heard, during the guilt phase of this trial, were something that weighed in favor of imposing the death penalty, and they certainly can do that.

I would submit, Your Honor, that they cannot be instructed to them -- no, I should not say that. I think that they can be instructed to them but I don't think that Mr. Cervone can offer argument on it, Your Honor, at this stage.

The last thing that I would and, again, I am merely anticipating what the State might do on the argument to the jury, is that if I should make argument on one of the mitigating circumstances, that Mr. Cervone be limited and not be allowed to turn any mitigating circumstance, that he disagrees with, into an aggravating circumstance.

I understand that he can argue that it is not a mitigating circumstance, but I would ask that he be restricted from then suggesting to the jury that, if it is not a mitigating circumstance, that it then becomes an aggravating circumstance.

That is all that I would have with respect to the aggravating circumstances presented by the State.

THE COURT: All right. Mr. Cervone.

MR. CERVONE: Your Honor, I would, again, first of all, by noting that the constitutionality of the statute that we are dealing with has been upheld by the Supreme Court of the state in numerous cases, including the Alford case which Mr. Salmon has, in fact, cited to the Court.

Secondly, I would state that, in my estimate the imposition of imprisonment as an aggravating circumstance is, indeed, one which is based on rational distinctions in that the manner of life-style, the degree of freedom, the mobility, the degree of supervision, the inherent rehabilitative efforts being applied to any prisoner do put him in a distinguishable class from any other person and that his behavior, while under that structured system, is, therefore, a distinguishable type of

behavior.

As to the Provence case, if the Court will carefully read that case, it will find that the Supreme Court, in stating the use of the word "conviction," emphasized the word "convictions", and that was done so that the court might point out to the trial court, in that case, had improperly considered prior arrests and not convictions in reaching its judgment.

As to whether or not the State should be allowed to argue the final aggravating circumstances of heinous, atrocious, or cruel, the question is one for the jury to consider. The evidence, upon which they may consider, is, in fact, already before them, and I find there to be no logic in asking the Court to restrict the State from arguing that when they have, in fact, heard the testimony already and where it is apparently conceded that the instructions, which the Court will give on whether or not they should consider that testimony to show that crimes had been heinous, atrocious, or cruel has been conceded.

As to Mr. Salmon's last point, I don't believe I follow it at all. I think it is imminently proper for the State, in argument to the jury, to

argue to the jury the existence of all factors, whether they be mitigating or aggravating.

THE COURT: All right, sir.

MR. SALMON: Your Honor, I would just like to make one comment to Mr. Cervone's last point.

What I am suggesting there is that, in my reading of the case law, it indicates that argument on aggravating circumstances is strictly limited, that it cannot go beyond the enumerated aggravating circumstances in the statute.

All I am suggesting is that he not be allowed, in his argument, to turn the lack of a mitigating circumstance into an enumerated aggravating circumstance.

MR. CERVONE: I understand that, but I think that the State must be allowed to comment on whether or not certain mitigating circumstances do exist.

For example, I think it is proper for the State to comment, as to the first mitigating circumstance, that the defendant definitely does have a significant prior criminal history.

THE COURT: All right. The motions are each denied.

MR. SALMON: Your Honor, I have one further

motion to make with respect to all of the aggravating and mitigating circumstances, essentially going to whether or not they should be argued at all.

I would argue that they are unconstitutional on the grounds that they are vague and overbroad in that they do not adequately define, to the jury, what it is they are to consider as aggravating circumstances and mitigating circumstances and how they may overlap, which I would argue to the Court is impermissible under the law.

THE COURT: Hasn't that issue already been settled by both the Florida Supreme Court and the United States Supreme Court, Mr. Salmon?

MR. SALMON: It was my understanding, Your Honor, that it had but, when I looked last night, I could not find it and I felt that at least it would be advisable for me to make it here today.

THE COURT: All right, sir. Does the State wish to respond, Mr. Cervone?

MR. CERVONE: Your Honor, I think it has, indeed, been resolved contrary to the defendant's position and I would ask the Court to deny that motion.

THE COURT: That is my understanding, Mr.

Salmon.

The motion is denied.

MR. SALMON: The last thing that I would request, Your Honor, I would move to be allowed to offer any and all mitigating circumstances that I might choose to argue to the jury in consideration of the penalty that they might advise on to the Court in this case.

I think that the case law, both at the -- well, certainly at the Supreme Court level of the United States in Gregg v. U.S., at 96 -- I don't have the U.S. cite, 96 Supreme Court 2909, 49 Law Ed.2d 859.

What I would like to do, Your Honor, if I may be allowed to is to state what I feel is the essential holdings of the Gregg case with respect to the flexible assessment of mitigating circumstances.

I would submit to the Court that the United States Supreme Court in Gregg did, in fact, emphasize the need for allowing complete, total flexibility in presentation of circumstances, whatever they might be, that the jury might find helpful in determining whether or not there are mitigating circumstances against imposition of the death

penalty.

THE COURT: Wouldn't I have to do the same thing then with respect to aggravating circumstances?

MR. SALMON: I think, Your Honor, that, again, the case law, in both Gregg and I believe that there is also a Florida cite, is precisely to the contrary, that, in fact, the case law indicates that comment on the aggravating circumstances must be specifically, minutely limited to those enumerated in the statute, the distinction being because of the gravity of the penalty which might be imposed in a first degree murder case.

They have said that, although aggravating circumstances must be strictly limited, the jury, in determining such a grave penalty, should have everything possible, whatever they might reflect on mitigative in determining their advisory sentence.

I would suggest to the Court that, the language in Gregg, holds that --

THE COURT: Are you suggesting that the Court should just give you carte blanche to come in here and present to that jury or say to that jury anything you choose to say?

MR. SALMON: Not anything that I choose to say, Your Honor.

As we have stipulated, primarily what I would have to offer would be items that are recorded in Mr. Morgan's master file, which have been stipulated to both by myself and Mr. Cervone, as allowable to be read without any further substantiation as evidence pending the Court's ruling on whether or not it would allow certain of those matters.

THE COURT: Would you disclose to me the nature of it, Mr. Salmon?

MR. SALMON: Yes, Your Honor. As I mentioned yesterday, I would like to present to the Court the matters that I feel would present to the jury information that would, in fact, cause them to believe that this is not a person that ought to be subjected to the death penalty in this case, matters of the probability and, indeed, very good possibility of his rehabilitation, a letter of commendation from the Governor of the State of Florida wherein, Your Honor, it is acknowledged that Mr. Morgan had, at extreme risk to his own life and safety, in fact, saved the lives of many employees of the Florida State Prison during the commonly known as the garment factory riots back

in the early seventies.

I would like to present to them the fact that this is not a man who simply laid fallow in the prison system during the course of his incarceration, but rather is a person who has taken very full advantage of the rehabilitation, educational constructive aspects of prison life, both with respect to educational possibilities and completing his GED, many, many vocational courses that were completed, the fact that, pursuing his education into the Lake City Community College area, that the recommendations of the classification teams are consistent that his confinement status be reduced and, in fact, at one point being reduced to minimum.

Essentially, Your Honor, matters such as that, the things that I feel that they ought to consider in determining whether or not this is a person that is totally absent of work and whose life should be snuffed out, or rather whether or not the indications aren't that, with the proper therapy, and I would also read from the psychological report indicating that if, the intense psychotherapy that had been recommended in Mr. Morgan's case back in 1975, had, in fact, been implemented,

that the chances would be excellent that this offense would never have happened.

THE COURT: All right, sir. Mr. Cervone.

MR. CERVONE: Your Honor, I would agree that the Court should give counsel broad latitude in presenting factors under the enumerated mitigating circumstances.

However, the materials which he wishes to present cannot be placed under any of these statutorily mitigating circumstances.

It is my position that they are irrelevant and not admissible before this jury. The very purpose of the statute, being enacted, was to closely limit the types of materials of aggravating and mitigating that can be presented so that the jury will not wantonly return verdicts of death or life without having some sort of guideline upon which to base those verdicts.

THE COURT: Mr. Salmon, do all of the material to which you refer relate to matters that have transpired since Mr. Morgan entered the prison system?

MR. SALMON: That is correct, Your Honor.

THE COURT: Upon reflection, the statute, I believe the first aggravating circumstance -- the

first aggravating circumstance enumerated in the statute is that the crime, for which a defendant is to be sentenced, was committed while the defendant was under a sentence of imprisonment. Now, that is an aggravating circumstance if it is established.

Does not the defendant have the right to speak to that and say, "Yes, indeed, I was under a sentence at the time I committed this offense, but in considering the fact that I was under commitment, and weighing that aggravating circumstance, the jury should also have the benefit of these things."

Would that not be a fair assessment of it?

MR. CERVONE: I would have no opposition to that, Your Honor.

THE COURT: I am going to permit it, I am going to grant the motion, Mr. Salmon, and allow you to place, before the jury, in accordance with the stipulation here, any matters that are documented from the prison file of the defendant.

MR. SALMON: Thank you very much, Your Honor.

I wonder if I might ask Mr. Cervone if he, after having read Dr. McMahon's partial report, would allow reading of that, also?

MR. CERVONE: I have no objection to that.

THE COURT: All right, sir.

MR. SALMON: Thank you.

THE COURT: Anything further, gentlemen?

MR. SALMON: That is all that I have, Your Honor.

MR. CERVONE: No, Your Honor.

THE COURT: Very well. Bring the jury in, Mr. Bailiff.

(Thereupon, the jury returned to the courtroom, was seated in the box, and the following further proceedings were had in the presence of the jury:)

THE COURT: You may proceed, Mr. Cervone.

MR. CERVONE: Your Honor, pursuant to the stipulation tendered to the Court yesterday afternoon, at this time I have three documents removed from the official files of the Department of Offender Rehabilitation, which I would tender to the Court and ask that they be accepted into evidence as State's Exhibits 14, 15 and 16.

THE COURT: Does the defendant wish to be heard with respect to the admissibility of these three documents?

MR. SALMON: No, Your Honor.

THE COURT: Very well. The documents referred

to by Mr. Cervone are received in evidence as the State's exhibits, whatever the next numbered exhibits will be, and will be appropriately marked by the clerk.

(The documents last above referred to were received in evidence as State's Exhibits Nos. 14, 15, and 16.)

MR. CERVONE: With the Court's permission, and also pursuant to the stipulation, may I publish these by reading them to the jury?

THE COURT: You may, sir.

MR. CERVONE: "In the Circuit Court --"

MR. SALMON: Your Honor, at this time I would say that my understanding, at this stage of the proceeding, is that Mr. Cervone may make mention to the jury of the items that he feels will be substantiated by argument on the issue of aggravating circumstances but now is not the time to submit those aggravating circumstances.

THE COURT: I don't understand what you mean, Mr. Salmon.

MR. SALMON: Your Honor, I will try to explain.

It is my understanding, under the procedure, at this stage of the trial that there will actually be four appearances, one by Mr. Cervone to enumerate to the jury the aggravating circumstances that

he feels will be shown by argument and by further evidence or testimony, and that I would then have an opportunity to relate to the jury what I feel, in the area of mitigating circumstances, would be presented to the jury during argument and/or in the presentation of testimony.

THE COURT: In other words, are you saying or are you suggesting that counsel be allowed to make opening statements, Mr. Cervone, excuse me, Mr. Salmon?

MR. SALMON: Yes, that is what I am suggesting, Your Honor.

THE COURT: Well, I will give counsel leave to do that if he wishes to but I can't compel counsel to make opening statements. I can't compel the State to make one or compel you to make one.

MR. CERVONE: Your Honor, I don't think that the statute contemplates that. I think that it contemplates only the introduction of evidence and then have closing argument, thereon.

THE COURT: That is the way that they have always been conducted in this division, Mr. Salmon.

MR. SALMON: Very well.

MR. CERVONE: May I proceed?

THE COURT: You may proceed, Mr. Cervone.

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MR. CERVONE: Thank you, Your Honor.

Exhibit 16: "In the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, State of Florida, the 9th day of June, 1970.

"State of Florida versus Floyd Morgan.

"In the name and by the authority of the State of Florida, the grand jurors of the County of Hillsborough, State of Florida, charge that Floyd Morgan, on the 26th day of May, 1970, in the county and state aforesaid, from a premeditated design to effect the death of James Louis Webb, did murder the said James Louis Webb by puncturing his body with a piece of wood, a further description which is to the grand jurors unknown, thereby inflicting wounds in and upon the body of the said James Louis Webb.

"As a result of said wounds, the said James Louis Webb did die, contrary to the form of the statute subcases made and provided, to-wit: Florida Statute 782.04.

"Indictment for first degree murder, a true bill."

It is signed by the foreman of the grand jury.

Exhibit 15: "In the Circuit Court of the

Thirteenth Judicial Circuit, in and for Hillsborough County, State of Florida.

"State of Florida, plaintiff, versus Floyd Morgan, defendant.

"Judgment: You, Floyd Morgan, being now before the Court, attended by your attorney, John S. Burton, Esquire, and you having entered your plea of nolo contendere to the charge of murder in the first degree, the Court adjudges that you are guilty of the crime of second degree murder.

"Done and adjudged in open court at Tampa, Hillsborough County, Florida, this, the 9th day of March, 1971."

It is signed by the Circuit Court judge.

Exhibit 14: "In the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, State of Florida.

"State of Florida versus Floyd Morgan.

"Sentence: You, Floyd Morgan, the defendant, having entered a plea of nolo contendere to the charge of murder in the first degree, the Court adjudges you to be guilty of the crime of second degree murder.

"Have you anything to say why sentence should not now be pronounced upon you?

"You, Floyd Morgan, the defendant, having said nothing to preclude the entry of this sentence, it is the judgment and sentence of this Court that you, Floyd Morgan, for your said crime of second degree murder, be taken by the sheriff or his lawful deputy to the state prison at Raiford, Florida, and delivered to the principal keeper thereof and there be confined in said state prison at hard labor for a period of 30 years.

"Ordered in open court at Tampa, Hillsborough County, Florida, this 9th day of March, 1971."

It is signed by the Circuit Court judge.

Your Honor, the State has nothing further to present.

THE COURT: You may proceed, Mr. Salmon.

MR. SALMON: Pursuant to that same stipulation, I would ask that certain items from that same file be marked and introduced as defense exhibits in evidence.

There are several of them, I have not counted them, I would have to go through them one by one, if that would be allowed by the Court, and then we could number them as we go along or perhaps we could mark them as a composite exhibit.

Then, Your Honor, the second exhibit that I

would like to have introduced into evidence is a letter from Dr. Elizabeth A. McMahon, again pursuant to the stipulation of myself and the State, as to its admissibility.

MR. CERVONE: That is correct, Your Honor.

THE COURT: The letter of Dr. Elizabeth A. McMahon, tendered by the defendant, will be received in evidence as Defendant's Exhibit No. 1.

MR. SALMON: That would be correct, Your Honor.

(The document last above referred to was received in evidence as Defendant's Exhibit No. 1.)

THE COURT: You may publish the letter to the jury, Mr. Salmon.

MR. SALMON: Thank you, Your Honor.

THE COURT: Mr. Salmon, I think what you are going to need perhaps is copies. I believe that you have the DOR file before you and you will not be able to remove them and file them with the court.

MR. SALMON: I think that we will need to make copies.

THE COURT: Do you propose to go through them one at a time and read them to the jury or do you propose to tender copies for them to peruse,

themselves?

MR. SALMON: I think, for my purpose, Your Honor, it would be sufficient for me to read from them without necessitating copies being made of each one for their perusal.

If I might do that through, again, the stipulation but without introducing them into evidence, perhaps it would not be necessary to make copies for the file unless the Court would so desire.

THE COURT: I would like anything that is considered by the jury to be made a part of the record.

MR. SALMON: It will not be necessary to have them provided for the jury, Your Honor.

THE COURT: All right, sir.

MR. SALMON: I think, for my purposes, Your Honor, it will be sufficient for me to read from them and allow me to have them rely on their own memory.

THE COURT: Well, after the proceedings have been completed, and while the jury is in deliberations, collaborate with the clerk in preparation of copies of those and mark them into evidence as appropriate exhibits.

MR. SALMON: Thank you.

THE COURT: You may proceed, sir.

MR. SALMON: Thank you, Your Honor.

Your Honor, actually, the same would apply with respect to this letter.

"Confidential material.

"Floyd J. Morgan is a 31-year-old white single male who is evaluated at the Florida State Prison on June the 7th, 1978, at the request of his attorney, Mr. William Salmon.

"In addition to an extensive diagnostic interview, the following tests were administered:

"The Wechsler Adult Intelligence Scale, a neurophysiological test battery, Peabody picture vocabulary test, the Minnesota Multiphasic Personality Inventory, and the Rorsch. hand test, and also projective drawings.

"Brief impression:

"Floyd Morgan is perhaps one of the few people that prison seems to have helped in some ways, for example, he finished his high school education and took several college and automotive mechanics courses. In fact, he has more definite goals now than he did prior to his arrest in 1970.

"Furthermore, it seems to me he seems --" excuse me. "Furthermore, he seems to have developed

some degree of insight into his own dynamics.

"It is regretable that he could not have received the extensive psychotherapy that was recommended in February of 1975.

"With his intelligence and his capacity for insight, he would most probably have benefitted from therapy and possibly this most recent incident might have been avoided."

I am sorry, I left out an initial paragraph.

"Floyd is currently functioning within the average range of intelligence, and there is no evidence of a major thought disorder nor a major affect disturbance.

"Surprisingly, there is not the degree of anger and hostility present in the test material that is often found in individuals who have committed the type of crime for which he is charged."

A letter submitted to the Florida State Prison by Mrs. Mary Jane Arnold, the defendant's mother:

"Floyd has had several head injuries. When he was about 12 years old, he and the neighbor boy were wrestling and the neighbor boy run his head into the metal corner that projects from the plaster in the archway, which injury got a pus sac in it and it had to be taken care of by the doctor.

"After he came out of the Army, he always complained of a headache and always took aspirins. He had a constant headache when he was in the Army in Vietnam in November of 1968.

"After he came out of the Army, he was kicked in the head by a pony and was in the hospital for three days in August of 1969."

A request by Mr. Floyd Morgan to the -- with respect to vocational training:

"I would like to ask your help in obtaining for me an opportunity to enter into vocational training in electronics or electricity.

"This is my primary interest and I have a little background in it.

"Inasmuch as I am a veteran and have educational benefits due me, I could enroll in correspondence courses to supplement the studies that I could obtain here.

"Since I am in prison, it is my desire to use this time to improve myself and learn a trade.

"I am willing to put forth the effort as I stated and supplement it with my GI benefits."

It is signed Floyd Morgan.

A form entitled "Extra Gain Time Recommendation, May the 3rd, 1972."

I would state merely that that is, in fact, what it is and that additional gain time was awarded.

A letter to the Florida Division of Adult Corrections from Alcoholics Anonymous.

"Subject: Morgan, Floyd.

"The Renaissance Group is proud to report that the above-named subject has attended 24 of 26 Alcoholics Anonymous meetings during the past six months.

"I believe that the above-named member of the Renaissance Group is a better man for having attended these meetings."

It is signed by Paul Colburn, cosponsor.

A Reclassification and Progress report, from Florida State Prison to East Unit on 4/20/72.

"Subject has recently received an average work and an above average quarter's report from his supervisors.

"Subject does not cause any disciplinary problems. The team feels that the subject should be the recipient of special counseling and probably could benefit from all involvement in the group treatment program when it could be made available to him.

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"Subject seems to be trying to take advantage of the programs that are being offered to him here at FSP by participating in the AA program, working on his GED diploma, and taking correspondence courses on the campus.

"In view of the above institutional prognosis -- in view of the above, institutional prognosis is good."

A Reclassification and Progress Report submitted to the Florida Division of Corrections, 3/5/1973.

"The subject was encouraged to participate in the group therapy and continue his studies.

"He appeared to have one of the better attitudes that I have interviewed in a long while and, should he continue with this type of attitude and work towards the goals that he has set for himself, it is felt that he will use this period of incarceration for self-improvement and rehabilitation for the future."

A Certificate of Achievement.

"This is to certify that Floyd Morgan has satisfactorily completed a course in improving industrial, community, and personal relations."

It is signed by the educational supervisor,

vocational coordinator, and instructor.

A Reclassification and Progress Report to Union Correctional Institution dated the ninth month of 1974.

"Subject currently has good reports in the areas of work, quarters, religion, and from the AA program.

"Institutional prognosis is, therefore, good."

A form entitled "Supplemental Team Decisions and Recommendations to Union Correctional Institution."

"Subject has received no disciplinary reports on this sentence. It is felt by this classification team that subject can perform well in a medium custody status.

"Subject is the editor of Alcoholics Anonymous Newspaper, and if this custody classification is granted, subject will be participating more in this type of service.

"Subject has no escape history and is not considered to be an escape risk."

A psychological evaluation on Floyd J. Morgan done February the 28th, 1975.

"Recommendations: Test results indicate that Inmate Morgan has the intellectual and personality

potential to get in touch with his latent hostility and work it out to the point of getting rid of it.

"He has been offered the opportunity to participate in the program which currently consists of studying psychological materials.

"Hopefully, time will be available in the future to give him the individual psychotherapy that will be needed to go along with this written materials project.

"Possibly, after intensive therapy, he would not be a menace to society upon release."

A Certificate of Achievement.

"This is to certify that Floyd Morgan has satisfactorily completed a vocational course in basic automotive mechanics."

A letter to Union Correctional Institution from the Hope Group.

"Reference: Floyd J. Morgan.

"To whom it may concern:

"Be advised the above-named inmate, a member of the Alcoholics Anonymous Hope Group at Union Correctional Institution, is in good standing and has attended outside AA, has attended speaking meetings and taken an active interest and participated in the program.

"I sincerely feel that the above-named inmate is a better man for having been a part of these programs and has shown, by his participation, that he is trustworthy and reliable.

"He has proven that his interest lies within the AA program and that he will continue to represent the AA group here to the best of his ability."

It is signed J. E. Hitchcock, sponsor AA Program, Union Correctional Institute.

A psychological evaluation with reference to Floyd Morgan on December 3, 1975.

"Summary of test results:

"Morgan may be diagnosed as exhibiting characteristics of a personality trait disturbance, passive aggressive personality aggressive type.

"Heavy drinking is also indicated in individuals exhibiting this profile.

"They may become tense, moody and depressed because of a low frustration tolerance.

"The Bender visual-motor gestalt test indicates that Morgan has difficulty in accepting and expressing anger and is afraid of his own aggression.

"We further suggest the existence of anxiety about or the fear of losing control over his

impulses.

"Other tests indicate that he has a need to protect himself from external pressures of the environment which results in his isolation from others. He sees himself as small and inadequate and thus may respond to the demands of his environment through inferior means."

A Department of Offender Rehabilitation Reclassification and Progress Report during the month of September, 1976.

"No. 8-Religion: Mass, two times per week.

"Education, tested IQ of 99, literacy reading level of 8.2.

"Subject states he has attained 19 semester hours at Lake City Community College. Subject claims he is taking 6 semester hours at this time.

"Other programs: Subject states that, in his spare time, he is involved in AA and studying his junior college homework.

"Team decisions and recommendations: Reduce to minimum."

A letter from the State of Florida, Office of Governor Reubin O'D. Askew. It is directed to Mr. Floyd Morgan.

"Dear Mr. Morgan:

"As Governor, I wish to express the appreciation of all individuals concerned for the quick and decisive action you took without regard for your own safety at the Florida State Prison in the recent disturbance in the garment factory on April the 30th, 1973.

"Your valuable assistance prevented further injury and perhaps death to the staff members involved.

"I fully realize that, by the actions you took, you placed yourself in jeopardy with your fellow inmates and this action is noteworthy.

"A copy of this letter is being sent to the Parole Commission for placement in your records.

"Sincerely,

"Reubin O'D. Askew, Governor."

Thank you, Your Honor.

THE COURT: Anything further, Mr. Cervone?

MR. CERVONE: No evidence, Your Honor.

MR. SALMON: That is all that I have, Your Honor.

THE COURT: All right, sir.

The same order of argument, I believe, applies that applies to the trial part.

You may proceed.

Excuse me just a moment. Would counsel approach the bench, please.

MR. CERVONE: Yes, sir.

MR. SALMON: Yes, Your Honor.

(Discussion at the bench.)

THE COURT: Ladies and gentlemen, we will now hear the arguments of counsel insofar as they are applicable to the penalty phase of this trial. The same order of argument will follow.

As you observed in the trial of the case yesterday, you will first hear from Mr. Cervone, speaking for the State, and then Mr. Salmon, speaking for the defendant, and then Mr. Cervone will use such of his time, as he has reserved for that purpose, to reply to the argument of counsel for the defendant.

Each side will be allocated 45 minutes for their final arguments.

MR. SALMON: Excuse me, Your Honor, but I must ask to be allowed to approach the bench again.

THE COURT: Very well.

(Discussion at the bench.)

THE COURT: Ladies and gentlemen, contrary to what I mentioned a moment ago, the arguments will be limited here to one argument to a side.

The State will speak first and then will be followed by Mr. Salmon, and that will conclude the arguments upon the penalty phase.

You may proceed, Mr. Cervone.

MR. CERVONE: Thank you, Your Honor.

I would not be so presumptuous as to attempt to speak to you as to the responsibility of this particular phase of this trial that places each of you under. It is your responsibility, and yours alone, to weigh what mitigating and aggravating circumstances the Court will read to you and to render an advisory verdict of death or life in this particular case.

You have heard the evidence in the case, itself, yesterday, and I ask you to think back and recall that evidence as I go over these factors, which the Court will shortly instruct and define for you. Consider that, as properly you may, as to whether or not the aggravating circumstances, that I wish to mention to you, exists. Consider it in addition to that which you have heard this morning.

By your verdict yesterday afternoon, you have declared this defendant is guilty of the crime of first degree murder, the premeditated killing

of Joe Edward Saylor.

This morning I have read to you, and have had introduced into evidence, three documents which show to you and establish to you that this defendant was not committing the crime of murder for the first time when he killed Joe Edward Saylor.

The documents which were read to you establish that, in 1970, in Hillsborough County, he was indicted for the first degree murder of one James Louis Webb, and subsequent to that, in 1971, he tendered a plea of nolo contendere, no contest, to the crime of murder in the first degree, but was for reasons that we should not speculate upon, sentenced for the crime of murder in the second degree, and that he has been incarcerated in the state penal system since then for homicide or murder.

Statutes in this state have established certain criteria, which you should consider in your own mind when deciding what verdict you would advise the Court to impose.

The only rational way, that any jury can consider this question, is to leave out emotion and to look at those factors and weigh them individually, in your own minds, and see where the balance lies

before you render your verdict to this Court.

In light of that, it would be my intention at this time to review those factors with you, and give you my own impressions as to what they show in this particular case.

Under the aggravating circumstances, first, which you will hear, is that the capital felony, committed by the person under sentence, was done while that person was under sentence of imprisonment.

You have convicted this man of a capital felony of first degree murder of Joe Edward Saylor, and you know, from the evidence and from the documentation presented to you today, that when he committed that crime of first degree murder, he was under sentence of imprisonment. He was imprisoned at the Union Correctional Institution for the second degree murder conviction that he received in Tampa in 1971.

I submit to you, therefore, that there is no dispute that that first aggravating circumstance exists. He was under sentence of imprisonment when he committed this crime.

Second, the defendant was previously convicted of another capital felony or of a felony involving

the use or threat of violence to the person.

By the documentation, introduced to you today, you know that Floyd Morgan, in 1970, committed the crime of murder against the person named as Webb in the documents that were handed to the Court.

I submit to you that this defendant, therefore, has previously been convicted of the felony involving the use or threat of violence to the person of another individual. Therefore, these first two aggravating circumstances exist beyond any dispute.

The third aggravating circumstance is that the defendant created great risk of death to many persons. I do not argue that to you.

Fourth, that the capital felony was committed while the defendant was engaged in the commission of or attempt to commit or flight from robbery, rape, arson, burglary, kidnapping, airplane piracy or the placing of a bomb. I do not submit to you that that exists.

Fifth, that the capital felony was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape. I do not suggest to you that that exists.

Sixth, that the capital felony was committed

for pecuniary gain, for monetary gain. I will not suggest to you that that exists. You may weigh the evidence, in your own minds, and determine it.

Seventh, that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws. I will not argue to you that that exists.

Eighth, the capital felony was especially heinous, atrocious, or cruel. You know how he killed Joe Edward Saylor.

The Court will define for you each of these phrases, especially heinous, atrocious or cruel. I submit to you that this death was a cruel death, that it was heinous, and that it was atrocious.

I ask each of you, when you deliberate, to consider the definitions that the Court will place upon those terms, and to think back to what you know of the death of Joe Edward Saylor.

It is my opinion and my suggestion to you that you will find that his death was one which is contemplated by this particular aggravating circumstance.

In summary of these aggravating circumstances then, it is my submission to you that three of them exist.

First, beyond any doubt, that the person who committed the crime, Morgan, was under sentence of imprisonment when he committed it.

Second, beyond any doubt that the person who committed the crime, Morgan, was previously convicted of a felony involving threat of violence or the use of violence against another person. You have it in the documentation which will be given to you.

Third, the crime was especially heinous, atrocious, or cruel, and you have that in front of you, as well.

To balance those circumstances, the statutes have also enumerated certain mitigating circumstances. I would like to go over with you briefly each of those, as well.

First, that the defendant has no significant history of prior criminal activity. It would be ludicrous for anyone to suggest to you that the man, who sits before you for a previous murder conviction, who has now been convicted by you of first degree murder, has no significant history of prior criminal activity.

That mitigating circumstance does not exist.

Second, the capital felony was committed

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA.

FLOYD MORGAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

VOLUME IV

Pages 584 thru 623

- - -

while the defendant was under the influence of extreme mental or emotional disturbance. You have heard, I submit to you, no evidence that, at the time he killed Joe Saylor, that this defendant was operating under extreme mental or emotional disturbance.

I will address myself shortly to the psychological evaluations in the court which defense counsel has presented before you, but I ask you to consider those, and realize the times that they were taken, from what they say, that they do not indicate that this man was under any emotional or mental disturbance at the time he killed Saylor.

I suggest that this circumstance does not exist.

Third, the victim was a participant in the defendant's conduct or consented to the act. From the evidence you have heard, at the guilt or innocence phase of this trial, you know, beyond any doubt, that Joe Edward Saylor was no participant in his death. You know how he died, what he was doing when he was assaulted.

I suggest to you that this mitigating factor does not exist.

Fourth, the defendant was an accomplice in

the capital felony committed by another person and his participation was relatively minor. You know, from the evidence you heard yesterday and the day before that, that this defendant was the sole perpetrator of this crime, and you know that his participation was far from relatively minor, and that he, in fact, is the one who killed Joe Edward Saylor. Your verdict says that.

Therefore, I suggest to you that this mitigating factor does not exist.

Fifth, the defendant acted under extreme duress or under substantial domination of another person. I suggest to you that there is no evidence indicating that this defendant acted under extreme duress. There is nothing but an indication that he acted cold-heartedly and clear-mindedly. There is no evidence that he was under the substantial domination of another person.

There is no evidence that this mitigating factor exists, and I ask you to disregard it. Next, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. I suggest to you that this does not exist.

There is no evidence indicating to you that this defendant suffers from any degree of retardation, any mental disturbance, or any impairment of the mind. There is, quite the contrary, evidence placed before you by defense counsel that, while he has been incarcerated on his prior murder conviction, he has been able to pursue educational goals, he has been able to function as a rational person, and he has been shown to be of normal intelligence.

I suggest to you that there is nothing indicating his having a lack of capacity to understand what he did.

In furtherance of that, your verdict indicates you believe him to have committed a premeditated murder, and that is not consistent with someone who has no capacity to understand what he was about to do on July the 16th of last year.

Finally, the age of the defendant at the time of the crime. It is my submission to you, and in the evidence, that this defendant is 31 years of age. I believe that at the age of 31 offers him no shelter and no recourse.

This mitigating circumstance does not exist.

It is my position then, and one which I would

ask each of you to consider strongly, that there is no mitigating circumstances in this particular case. Quite the contrary, those things which have been presented to you in mitigation argue against mitigation.

You have heard a letter from the defendant's mother indicating that he has suffered head injuries since he was 12 years of age. This does not indicate any mitigation whatsoever.

You have heard institutional reports dated in 1972 saying that his prognosis for life within the institution is good.

I ask you to reflect on what happened to Joe Edward Saylor and tell me whether or not Floyd Morgan had a good prognosis for satisfactory institutionalization. Perhaps, in 1972, someone thought he did but, in 1977, he showed them to be wrong.

In 1973 it was written that he had one of the better attitudes that were seen. In 1977, when he killed Saylor, that was shown to be wrong.

In 1975 the psychological or psychiatric evaluations indicated that he had latent hostilities and used the word "possibly", when saying possibly he might not be a menace to society upon

his release.

Further psychiatric evaluations, which have been read to you by counsel, shows that he has personality disturbances, is aggressive, is, in fact, afraid of his own aggression.

These offer no mitigation, in my estimate.

In 1976, the IQ tests, which I have mentioned, were given. In 1978, Dr. McMahon, a licensed clinical psychologist, has written for you the fact that, had he been given therapy, just possibly the most recent incident might have been avoided.

You have heard this letter read to you in its entirety and you have seen in it nothing which indicates any mitigation whatsoever.

In summary, I would say to you that there are numerous aggravating circumstances, and that I believe three of them to exist. Well, sure, you must find two of them exist because they are in the evidence in the form of a prior conviction and his current incarceration.

The third, the nature of the death of Joe Saylor is something for you to deliberate in the jury room and I believe that you will find that that, too, exists.

I believe you will also find that none of the

mitigating circumstances, which will be mentioned to you by the Court, exists.

It is, therefore, your responsibility, in weighing these things, should you find the aggravating circumstances to outweigh the mitigating circumstances, and I suggest to you there being a total lack of mitigation that they must, to return an advisory verdict of death in this case.

In 1970 Floyd Morgan killed in Tampa when he was a member of our own free society. It was the determination of the sentencing court, in that particular case, that he could not be allowed to live in society as a free man and, for that killing, he was removed from the freedom of society and placed in what would hopefully be a more structured, more rigid society of an institution where perhaps he could live safely and where others could live with him in safety.

In 1977, by your verdict yesterday, he killed a second time.

There is nothing left at this point, I suggest to you, for one who could not function in free society and who cannot now function in confined society, but for you to recommend to the Court the imposition of the death penalty.

A careful weighing of all of the circumstances and all of the evidence as to the crime and as to the defendant's background, I am sure will establish to you that this is so.

It may be regretable but sympathy has no part in your decision. Sympathy played no part in the crimes that were committed by this man, and I ask you to consider that, as well, when you render your verdict.

I ask that that verdict reflect the fact that there is sufficient aggravating circumstances in his background and in this crime to outweigh any mitigating circumstance and that, in fact, no mitigation exists and, based upon that, to return an advisory verdict to this Court of a death sentence.

Thank you.

THE COURT: Ladies and gentlemen, I don't wish to interrupt Mr. Salmon's argument. Counsel has 45 minutes for his argument.

We have been here for about an hour and I don't wish to interrupt Mr. Salmon's argument to recess once he has begun.

Would you like to take a short recess before we hear his argument?

THE JURY: Yes.

THE COURT: All right. Let's take about a ten-minute recess.

THE BAILIFF: Court will be in recess for ten minutes.

(Thereupon, a short recess was had.)

THE COURT: Call the court to order.

THE BAILIFF: Court will come to order.

THE COURT: Mr. Salmon, you may proceed with your argument.

MR. SALMON: Thank you, Your Honor.

Ladies and gentlemen of the jury, I needed to compose myself the last time I appeared before you, and I am going to have to ask for your consideration at this point because it is going to be a lot worse for me.

I would say to you, right at the beginning, that I hope that what I have to offer you will find useful. I am hoping that it will be logical enough to make sense to you.

I would ask that you give me the benefit of the doubt and try and listen closely to what might seem to be disjointed but be able to pull a string through it and make some sense out of what I feel is deserving your consideration.

I usually don't appear before a jury with

notes, but I felt that, in this particular situation, there was no way that I could avoid it. I apologize for it.

The object of your deliberations, at this point, is a decision on whether or not life should be ended or should life be retained. I submit to you that that is the question. At this point, we are not talking about people any longer, we are talking about life, itself.

I see, arguably, two reasons for imposing the death penalty. One is as a deterrent to crime; we spoke of that earlier.

Unless I misunderstood, it was my impression, if not all of you, certainly a vast majority of you, believe it was not a deterrent.

I would agree with that, and I would submit to you that all of the research, all of the scientific data, backs that up also. It is not a deterrent.

I would ask you, for whatever reason, that you agree with that, and I think that this kind of topic is something that is perhaps something that we can't try and lay out all of the reasons why a person feels the way he does, but I submit to you that you are right.

I don't want to see that spark die at any point.

The second is one that is closer to the very basis of feelings that I guess that we all have; so, I think I have to mention it, and that is one of retribution or revenge, an eye for an eye, a tooth for a tooth. I don't know that that has ever gotten anybody anyplace.

I think that laws, the purpose of a jury, is, in fact, designed to prevent that. That is one of the things that we hope to accomplish by our system of laws, that we don't have to revert to revenge.

I submit to you that, as a body within that system, the very body that is designed, as one of its functions, to prevent that, should not consider this matter of revenge. I think it plays no part in the matter of life.

Mr. Cervone mentioned the death of Joe Saylor. Could I, could anyone be any more saddened at the loss of Joe Saylor's life? I don't see how, I don't think anybody could.

I am as compassionate a man, a person as anyone. The same heart beats in here that beats inside your chest. I think, rather, our compassions

now should be directed to life, for whatever reason, some of them more traditional ones, the possibility of putting to death an innocent man. I don't know if that has any viability or not, but I don't think that it is the only one that should be considered.

I think the question here is whether or not, for whatever reason, life should not be ended. That is what I would hope to try and convince you of at this point.

One other thing that you all said, at the beginning of our deliberations at the very beginning of this trial, was that there was no situation, absolutely no situation in a case of first degree murder, where you could not consider life. Again, a spark that I do not want to see put out because I think that is the one that burns most brightly at this point.

I submit to you, ladies and gentlemen, that this is not a case, not in the contemplation of law, not in the contemplation of man, where death is indicated.

Mr. Cervone mentioned the aggravating and mitigating circumstances that you now have for your consideration. I would also like to go over those.

I am -- again, I am going to ask that you not find whatever merit that I might have, with respect to mitigating circumstances, only in what I say. I submit to you that you have your own reasons, many of which I probably am not aware of.

I gave you my thoughts only as perhaps elements that would add to the reasons that you already have in mitigation in this case.

The first one, "A," the defendant has no significant history/of prior criminal activity. I think in every instance, in every situation when you are dealing with what does something mean, how do we decide what the people who wrote this meant when they wrote it? Is it so clearly defined that it is only subject to one definition? I think not.

The key phrase obviously is "significant history." Did Mr. Cervone present anything to you that was indicative of Floyd Morgan being a lifelong criminal problem? No, he didn't, because, in fact, it is not so.

I think one clear definition of "significance" is whether or not there is a substantial quantity of prior criminal activity. I think that is contemplated in the very definition of the word, and I think it was certainly contemplated by the

Legislature when passed in this statute.

One way that you can look at it is: Did the Legislature contemplate ending the life because of one prior criminal instance? I think it is something that you have to consider. I think it is not what they considered and I feel that it is a mitigating circumstance.

"B" is that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

I don't know what that means, I don't know how you decide. I know that you have heard certain things, and you are aware of the conditions inside of prison. You have people sitting in your body now who can tell you what some of that pressure is, what the incredible conditions are like inside those walls, and what it does to people, how it makes them act. Not that it is something to be explained, not that it is to be something that it is understood, but something that, in fact, does have an impact on how people act inside the prison.

There are a couple of others that I think fit in that same category. The defendant acted under extreme duress or under substantial domination of

another person. Is there any way that we can tell, sitting out here, what throws a prisoner, inside those walls, into a state of extreme emotional distress? There is no way. It is a life that very few people are forced to live, but it is reality in there.

It is the conditions, inside those walls, that cause people to act the way they do. Does it create duress? I certainly think that it can; I certainly think that it can.

"E" is the defendant acted under extreme duress -- I am sorry. In addition to that is that he acted under substantial domination of another person.

Again, what did the Legislature mean when they passed that? Did it mean that somebody had to be walking around with a gun to your head to make you do something? Did it mean that you had to hold one of your children hostage to make them do what you wanted them to do? I don't know.

I think that there is something else to at least consider and I think that you have heard it in the main course of this trial; other people being involved, physical evidence demonstrating that certainly every possible exclusion of what

happened was not, in fact, eliminated.

You are dealing with a totally irreversible decision, totally. I think you have got to consider, in view of what you heard during the evidence stage of this trial, whether or not those things were, in fact, involved. Is it possible? That is all that we are talking about. Is it reasonable to consider them?

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

I think that certainly the evidence that I presented, in my first appearance to you today, cuts both ways.

We are only talking, I think, at this point justifiably about one edge of that, and that is it is not a situation, as Mr. Cervone suggested, that he was intellectually capable and that things were going along fine in the prison.

He had a very dramatic turn of events, something set him off.

He is not, at the time of this act, the person that is demonstrated to be a person who was worthwhile, capable of being rehabilitated,

capable of functioning. He was a man under the influence of other things that I read in those reports, with a different personality. It was somebody else, it wasn't the person that could get along.

The reports indicate that he had a fear, not that he was concerned about his own hostilities, his own latent hostilities, his own aggression, but that he was afraid of them, that he couldn't control it, that when the provocation arose, he lost sight of his other abilities.

That, I think, is one of the things contemplated in this enumerated mitigating circumstance.

I think that the reports indicate that, in fact, at that particular time he did not appreciate fully what he was doing and that he could not conform. As the reports indicated, he had lost control, for whatever reason, and we don't know that, we don't know why. There are too many reasons to try to find out.

The age of the defendant at the time of the crime, that is all it says; that is all it says.

Now, they say "age" here. Age is obviously the key word in that mitigating circumstance.

Well, how did they intend that to be used?

Dr. McMahon's letter indicates that he is not a person who is wasted, he is not so far gone that he cannot be brought back to a stable situation. It does not indicate that he is so old that it would be impossible for him, through the psychotherapy which was indicated so many years ago, were only implemented that we would have, at least, a possibility of a different person, we would be dealing with a different personality.

I think that that is certainly one of the ways that age is to be considered, whether or not he is not so old or so far down the road that he cannot be, through proper therapy, retrieved in some respect.

I don't know how many that is, I don't know. All I know is that the law says that you must decide whether or not they are outweighed, one by the other or vice versa. It is not a counting process. You don't go back in there and say, "Well, our decision is an easy one. All we have to do is count up and see how many they had and see how many he had."

That is not the law, the judge will instruct that that is not the law. It is whether or not

mitigating circumstances that you find, and you are the only ones to decide mitigation in this case, mitigation in whatever form you find it, outweighs aggravation.

I would like to comment briefly on the aggravating circumstances.

The capital felony was committed by a person under sentence of imprisonment; on the bare face of it, indeed, we have that, there is no getting around it.

I think that the consideration, in determination of whether or not life should be ended, is whether or not it is fair and proper to be considered, as such. Why do I feel it is unfair? Well, we have talked about some of them. The incredible pressures inside of the prison, the frustrations, the anxieties. It seemed to me that if they meant -- well, let me put it this way: It seems to me that, if we agree with that, if you agree with me, that the things are different inside a prison, that that is a situation that could cause a person to act irrational and that it is almost not to be considered as an aggravating circumstance, because it is something that causes the illogical behavior, it is something that causes

the irrational act. It is not something that turns it into, again, the cold-blooded nature, the aggravating nature.

On the other hand, did they consider it purely and simply in just a matter-of-fact way that, "Well, if you are in prison and you commit a capital felony, we are going to count it as an aggravating circumstance because you are a prisoner, because you have a record, because you have done something bad."

If that is what they consider it, then I think it is unfair in the sense, as you all know, as we all know, there are people, in the thousands, I suppose, walking around the streets today that have records that are so much longer, so much worse, so much more horrible than Floyd Morgan's.

Why should that person, if it should happen to him again, be able to come and say, "Well, that is an aggravating circumstance that is not present?" I don't think that it fits for that reason, because the only things that they are considering is that he is a prisoner.

Floyd Morgan does not come anywheres near the records of some of the people that are walking around free today.

The defendant was previously - and I emphasize this word - convicted of another capital felony or a felony involving the use or threat of violence to the person.

I would submit to you that that is not to be considered in the disjunctive, they are together, it is not an either/or situation.

The two phrases mentioned in that are of co-equal status. They are saying it is a capital felony that he was previously convicted of, that is of violence.

The thing that you must consider, or one of the things that you must consider with respect to that previous conviction, is, in fact, what the conviction was for.

Floyd Morgan was not convicted for a capital felony, he did not plead guilty to a capital felony, he did not admit to a capital felony.

He pled what is known as nolo contendere. That is taking it to the judge and saying, "Judge, I am leaving it up to you. You decide what I am guilty of."

It is not what the state attorney charged in that case, not what the grand jury Indictment was, but what he was convicted of; it was second degree.

Some of the others that Mr. Cervone said that he either would not argue or were not applicable, and that is certainly so, and I think that some of the ones that are not applicable are, again, indicative of what was contemplated in deciding or presenting to a jury what they would decide, was a case in which life should be ended.

Engaged in the commission or was an accomplice in the commission of several of those other offenses, robbery, rape, arson, kidnapping, aircraft piracy or the placing of a bomb.

The capital felony was committed for the purpose of avoiding or preventing lawful arrest.

The capital felony was committed for pecuniary gain, to disrupt or hinder the lawful exercise. Now, that is one, two, three, four -- that is four out of the eight that are available that do not, simply do not apply in any way, and the reason or the importance of why they do not apply is the things that are in addition, things in addition that ought to be considered, that the Legislature said ought to be considered, in determining whether or not a person's life should be ended.

Now, that brings us to the last one, which I think is tied in with all of the other ones, and

it is without question the one most important aggravating circumstance that was contemplated in determining the issue of whether or not a life should be ended, and that is whether or not the capital felony was especially heinous, atrocious, or cruel.

I submit to you, ladies and gentlemen, that this was not, absolutely not heinous, especially heinous, especially atrocious or especially cruel.

I don't know how to say this but I have got to, and I ask that you consider it, do not immediately think that what I have said or am about to say is ludicrous, in that I ought to be examined.

I say it because I feel it is important. Especially heinous, especially atrocious, especially cruel is something other than the ordinary class of crime for which the death penalty is provided. That is what that means.

Excuse me one moment, ladies and gentlemen.

Madam Clerk, could I get you to do some paperwork?

THE CLERK: Yes.

MR. SALMON: Did anyone pick up any of the papers that I had?

THE COURT: Are you looking for the Harden

case?

MR. SALMON: I believe I am, Your Honor. Thank you, sir.

The very highest court in the State of Florida has given some very clear indications on what was contemplated, not only by this particular aggravating circumstance, but also the class of crime, the nature of the act that they intended to be at least considered for the death penalty.

The Supreme Court has said: "Heinous, as used in this section, authorizing the death penalty, means extremely wicked, shockingly evil;

"The term 'atrocious' as used in this section, means outrageously wicked and vile.

"Again, for purposes of the sentencing hearing, to determine the appropriateness of the death penalty for commission of first degree murder, the determination of whether especially heinous aggravating circumstances present depends upon whether beyond the horror of murder" - beyond the horror of murder - "is accompanied by such additional facts as to set the crime apart from the norm and whether the murder is conscienceless, pitiless, unnecessarily torturous of the victim."

Translated into facts of what I think that

means is, as said by the Supreme Court again: "Circumstances justifying especially heinous, atrocious and cruel: There was medical testimony that decedent's body bore"--

MR. CERVONE: Objection. I object to the introduction of any facts in a case that is not involved in this particular case as being irrelevant, Your Honor.

THE COURT: Objection sustained.

MR. SALMON: I submit to you, ladies and gentlemen, that, by the cases determined by the Supreme Court of Florida, as I have said, it was reserved for something beyond the norm, something more than the crime you have under consideration.

I think, ladies and gentlemen, that I have covered pretty much everything that I want to.

You now have got to decide whether or not life, that is all, that is it.

To recap just a little bit, I think that you have what we earlier talked about, the ability to always, to always be compassionate, always consider the alternatives.

This is not a case that should take or should remove from your consideration the things that you have already sworn and promised me that

you hold very dear. I think that is important.

I guess what I am trying to say is that it isn't everything that you have heard over the last four days, everything that you have heard here today especially, everything that you know, everything that you hold to be dear, everything that you believe in, in this case does not justify the ending of life.

Thank you very much.

THE COURT: Would counsel please approach the bench.

MR. SALMON: Yes, sir.

MR. CERVONE: Yes, sir.

(Discussion at the bench.)

THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be inflicted or imposed upon the defendant, Floyd Morgan.

As you have been told, the final decision, as to what punishment shall be imposed, is the responsibility of the judge. However, it is your duty to follow the law, which will now be given you by the Court, and render to the Court an advisory sentence based upon your determination, as to whether sufficient aggravating circumstances

exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances.

Your advisory sentence should be based upon the evidence which you have heard while trying the guilt or innocence of a defendant and evidence which has been presented to you in these proceedings.

The aggravating circumstances, which you may consider, are limited to such of the following as may be established by the evidence:

1. The crime for which a defendant is to be sentenced was committed while the defendant was under sentence of imprisonment;

2. At the time of the crime, for which the defendant is to be sentenced, he had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;

3. A defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons;

4. The crime for which a defendant is to be sentenced was committed while a defendant was

engaged, or was an accomplice in the commission of, or an attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;

5. The crime for which a defendant is to be sentenced was committed for the purpose of avoiding, or preventing a lawful arrest, or effecting an escape from custody;

6. The crime for which a defendant is to be sentenced was committed for pecuniary gain;

7. The crime for which a defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

8. The crime for which a defendant is to be sentenced was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain, utter indifference to or enjoyment

of the suffering of others or pitiless.

If you do not find that there existed any of the aggravating circumstances described to you, it would be your duty to recommend a sentence of life imprisonment.

Should you find one or more of these aggravating circumstances -- if you should find one or more of these aggravating circumstances exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances. The mitigating circumstances you may consider, if established by the evidence, are as follows:

1. A defendant had no significant history of prior criminal activity;

2. The crime for which a defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3. The victim was a participant in the defendant's conduct or consented to the act;

4. A defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor;

5. A defendant acted under extreme duress or under substantial domination of another person;

6. The capacity of a defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was substantially impaired;

7. The age of a defendant at the time of the crime.

Aggravating circumstances must be established, beyond a reasonable doubt, before they may be considered by you in arriving at your decision.

Proof of an aggravating circumstance, beyond a reasonable doubt, is evidence by which the understanding, judgment, and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved, to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance, which does not convice you, beyond a reasonable doubt, of the existence of such circumstance at the time of the offense, should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence

tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence, you recommend to the Court, must be based on the facts as you find them from the evidence and the law, as given to you, by the Court. Your advisory sentence must be based upon your finding of whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances. Based on these considerations, you should advise the Court whether a defendant shuld be sentenced to life imprisonment or to death.

In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous, and an advisory sentence may be rendered upon the finding of a majority of the jury.

Should a majority of the jury determine that a defendant should be sentenced to death, you should recommend an advisory sentence as follows:

"A majority of the jury advise and recommend to the Court that it impose the death penalty."

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the jury determine

a defendant should not be sentenced to death, then you should render an advisory sentence as follows:

"A majority of the jury advise and recommend to the Court that it impose the sentence of life imprisonment."

The Court instructs you, as a matter of law, that, if the defendant is sentenced to life imprisonment, he will not be eligible for parole during the first 25 years thereof.

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment.

You will now retire to consider your recommendation, and when seven or more are in agreement, as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned into court.

Ladies and gentlemen, before actually commencing your deliberations, the Court is going to declare a recess until 1:30 -- Mr. Sheriff, will that be sufficient?

THE BAILIFF: Yes, sir.

THE COURT: -- to enable you to have lunch and so forth before you begin your deliberations.

Forms for each of the advisory sentences, that I have referred to, have been prepared for your use and they will be delivered to the jury room for you.

You can place those on the table in the jury room, Mr. Bailiff.

Is there anything further before we recess, ladies and gentlemen?

MR. CERVONE: None for the State, Your Honor.

MR. SALMON: None for the defense, Your Honor.

THE COURT: All right, sir. Court will be in recess until 1:30 and, upon your return, ladies and gentlemen, you may go directly to the jury room to begin your deliberations.

You must remain together, however. I will instruct you not to discuss this matter among yourselves nor with anyone else until you have actually retired to the jury room to commence your deliberations.

Court will be in recess.

THE BAILIFF: Court will be in recess until 1:30.

(Thereupon, the jury retired from the courtroom and the following further proceedings were had out of the presence of the jury:)

THE COURT: All right. Excuse me, gentlemen, but, before proceeding with this case, in the event that there is any question that should arise with respect to the peremptory challenges, and in order to let any appellate court read the entire record, I intend to file in the minutes of the court -- in the records of the court, at the conclusion of the trial, my jury diagram showing, by number, the peremptory challenges exercised by either party.

MR. CERVONE: Yes, sir.

MR. SALMON: Yes, Your Honor.

(Thereupon, court recessed at 11:45 o'clock a.m., to be reconvened at 1:30 o'clock p.m. of the same day.)

AFTERNOON SESSION

1:30 o'clock p.m.
June 15, 1978

* * *

(Thereupon, court stood in recess pending return of the jury.)

THE COURT: Court will come to order.

THE BAILIFF: Court will please come to order.

THE COURT: Bring the jury in, Mr. Bailiff.

THE BAILIFF: Yes, sir.

(Thereupon, at 2:20 o'clock p.m. the jury returned to the courtroom, was seated in the box, and the following further proceedings were had in the presence of the jury:)

THE COURT: Ladies and gentlemen of the jury, have you agreed upon an advisory sentence to the Court in this case?

JUROR NO. 1: We have, Your Honor.

THE COURT: Would you please give the verdict to the clerk, Mr. Foreman.

JUROR NO. 1: Yes, sir.

THE COURT: All right. The defendant will stand and face the jury as the clerk reads the verdict.

THE CLERK: "Advisory sentence:

"The majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, Floyd Morgan.

"Dated at Lake Butler, Union County, Florida, this 15th day of June, 1978."

THE COURT: Please be seated, ladies and gentlemen.

Ladies and gentlemen of the jury, it is necessary that we poll the jury to make absolutely sure the advisory sentence that you have just returned is that upon which a majority of you agree.

We are going to ask each of you individually concerning this, but you are instructed that it is not necessary to state how you personally voted or how any other person voted, but to state only if the advisory sentence, as read, was correctly stated.

Would the clerk please poll the jury.

THE CLERK: Do you, Marjorie Dobbs, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 6: Yes.

THE CLERK: Do you, Dorothy Blom, agree and confirm that a majority of the jurors join in the

advisory sentence you have just heard read by the clerk?

JUROR NO. 5: Yes.

THE CLERK: Do you, Iris Louise Griffis, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 5: Yes, I do.

THE CLERK: Do you, Donald Andrews, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 3: Yes, I do.

THE CLERK: Do you, Wade Logan Andrews, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 2: Yes, I do.

THE CLERK: Do you, Robert J. Anderson, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 1: Yes, I do.

THE CLERK: Do you, Jean N. Waters, agree and confirm that a majority of the jurors join in the

advisory sentence you have just heard read by the clerk?

JUROR NO. 7: Yes, I do.

THE CLERK: Do you, Henry M. Pinkston, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 8: Yes, I do.

THE CLERK: Do you, Kathryn J. Reddish, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 9: Yes, I do.

THE CLERK: Do you, Mary L. Douglas, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 10: Yes, I do.

THE CLERK: Do you, Sharlynn D. Gordon, agree and confirm that a majority of the jurors join in the advisory sentence you have just heard read by the clerk?

JUROR NO. 11: Yes.

THE CLERK: Do you, William J. Cowen, agree and confirm that a majority of the jurors join in

the advisory sentence you have just heard read by the clerk?

JUROR NO. 12: Yes, I do.

THE COURT: The verdict will be recorded in the minutes of the court.

Adjudication of guilt is withheld at this time. Sentence will be deferred until a date to be announced later by the Court.

I will request the Probation and Parole Commission to furnish the Court with a presentence report prior to the imposition of sentence.

The defendant is remanded to the custody of the Division of Corrections.

Ladies and gentlemen of the jury, you have just completed what I know has been a very burdensome responsibility. I know that such decisions do not come easy, and the responsibility in making that decision rests gravely upon all of us.

I would like to thank you for your participation in the trial of the case here this week, and will commend you for your diligence and your punctuality in attending to these matters.

I cannot wish that you would have enjoyed the responsibility that you have just discharged but, nevertheless, I hope that your presence here has

deepened your understanding and given you greater insight into the means by which the legal affairs of our citizens are administered through the court.

I thank you for your service and hope that we will have an opportunity to have you back with us again at some time in the future.

The jury will be discharged in just a few moments.

Has the defendant been removed from the courthouse?

THE BAILIFF: I will have to check and see.

THE COURT: All right. Would you notify the Probation and Parole office in Starke to prepare a presentence investigation in this case?

THE CLERK: Yes, sir.

THE BAILIFF: The courthouse is clear, Your Honor.

THE COURT: Very well. The jury is discharged and court is in recess.

THE BAILIFF: Court will be in recess.

(Thereupon, at 2:50 o'clock p.m. on June 15, 1978, the trial was concluded.)

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C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF ALACHUA)

I, William E. Thompson, do hereby certify that the case of Floyd Morgan, Appellant, vs. State of Florida, Appellee, was tried before the Honorable Theron A. Yawn, Jr., Circuit Judge, and a jury of twelve, at the Union County Courthouse, Lake Butler, Union County, Florida, on the above entitled dates; that I was authorized to and did report in shorthand the trial in said cause, and that the foregoing pages numbered 1 through 623, inclusive, constitute a true and correct transcript of my shorthand notes of the trial herein.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 22nd day of August, 1978.

William E. Thompson
Official Court Reporter,
Certified Shorthand Reporter,
Registered Professional Reporter.

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wounds were. You saw photographs displaying two wounds in the man's back, you saw wounds on his arm and side, you saw wounds, including that which proved to be the fatal wound in his front, his neck and his chest.

I suggest to you, ladies and gentlemen, that an assault of that nature, with that many wounds spread over that portion of the man's body, indicates that the assailant knew exactly what he intended to do, and that what he intended to do was cause death.

There can be no other reason for a continued assault of that nature, other than to cause death.

Dr. Clark indicated to you, and you can examine from the photographs when you deliberate in the jury room, that the wound in the chest is the one which actually caused death.

I suggest to you that the person who committed the assault, in this case the defendant, Floyd Morgan, continued to stab and strike at Saylor until he inflicted a wound which he knew would cause death; that very wound there.

It was mentioned to you, by Dr. Recchione yesterday morning, that, when he looked at that wound, he could see the man's heart. Dr. Clark

told you that that wound was approximately three inches in depth or that it severed or came close to severing the man's aorta. From that, you can reasonably understand why the large quantity of blood, that you saw in those photographs, was on the floor and you can reasonably infer that that wound was inflicted with the intended purpose of causing death. There can be no other reason for striking a man in that way.

I would suggest to you, and look at the photographs and see if they don't bear this out, that the first assault occurred while the man was in bed. You will see that, in the bed next to the body, there is a large portion of blood on the sheets. I suggest to you that those blows were ineffectual, as far as causing death. What they did was awake or disturb the man so that he began to resist or attempted to fight back or try to struggle or ward off this assault in some fashion.

I suggest that you can infer that from the nature and number of wounds on his arm. It is my suggestion that those are defensive wounds, wounds he received while trying to defend himself.

Imagine, if you will, raising your arm to try to ward off a blow, and you can see how those

stab wounds and slashes on the arm are inflicted. Imagine then, as the man weakens through loss of blood and from this assault, barely awake, that he puts his arm down and the fatal wound in the chest is inflicted, the wound to the throat or neck is inflicted, and the other more shallow wounds are inflicted to his chest.

It is my suggestion to you that that, in and of itself, proves premeditation. Had the defendant not intended to kill, he would not have continued this attack until those wounds were inflicted. Had he not intended to kill, had he intended only to harm in some way or to threaten or intimidate, there would have been no necessity, no purpose beyond the infliction of the initial wound and you would not have seen wounds of the severity that you had described to you.

Premeditation is not something which needs to exist - the instructions that the Court gives you will mention this - for any specific length of time. Premeditation may exist for a short period of time or for a long period of time.

In this particular case, you can find premeditation simply from the period of time where those wounds wereinflicted or, more importantly, you can